No. 4412

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

# Brief of Plaintiff in Error

**Upon Writ of Error to the United States District Court of the District of Arizona**

THORWALD LARSON,
County Attorney,

E. S. CLARK,
NEIL C. CLARK,
Attorneys for Plaintiff
in Error.

Filed....., 1925.

.....
Clerk.

IN THE

# United States
# Circuit Court of Appeals

For the Ninth Circuit

| | |
|---|---|
| NAVAJO COUNTY,<br>PLAINTIFF IN ERROR,<br>-v-<br>LOUIS F. MESMER, an individual, doing business under the firm name and style of MESMER & RICE,<br>DEFENDANT IN ERROR. | NO. 4412 |

## BRIEF OF PLAINTIFF IN ERROR

### STATEMENT OF THE CASE

This case arises on a contract entered into on the 5th day of September, 1916, between the defendant in error as contractor, and the plaintiff in error, Navajo County, wherein the contractor agreed to build a certain bridge across the Little Colorado River in Navajo County, Arizona, for the sum of $23,800.00. This contract is set out in full in the amended complaint filed by defendant

in error, as plaintiff in the trial court. (Tr. Rec. pp 68, et. seq.) The contract, in so far as the principal questions here presented, are concerned, is as follows:

THIS AGREEMENT, made and entered into this 5th day of September, A. D., 1916, by and between Navajo County, Arizona, by and through its Board of Supervisors, party of the first part, and Louis F. Mesmer, doing business under the name of Mesmer & Rice, Los Angeles, California, the party of the second part,

WHEREAS, the party of the first part heretofore advertised for bids for the construction and building of certain bridges and,

WHEREAS, said bids were received at the office of the Board of Supervisors of Navajo County, Arizona, and opened the 3rd day of July, A. D., 1916, for the constructing and building of the bridge hereinafter mentioned, and

WHEREAS, the party of the second part submitted bid for construction and building said bridge, and

WHEREAS, the said bid of the party of the second part appears to be the lowest and best bid received, and was accepted by the County of Navajo, by and through its Board of Supervisors, and

WHEREAS, for the purpose of identification and to set forth more fully the provsions and stipulations of this contract, said call for bids with speci-

fications for such bridge is hereto attached and made a part hereof, and

WHEREAS, FOR THE same purposes the said bids are hereto attached, and made a part hereof, and

WHEREAS the party of the second part has agreed and by these presents does agree to construct and build the bridge hereinafter described, for the sum of twenty-three thousand eight hundred and no.100 ($23,800.00) dollars,

NOW, THEREFORE, the said party of the second part has agreed and by these presents does agree to and with the party of the first part, for and in consideration of twenty-three thousand eight hundred and no/100 ($23,800.00) dollars, to furnish all the materials and labor therefor, and in an efficient and womanlike manner, and according to the plans and specifications designated and attached hereto and made a part hereof, to construct and erect the following bridge, upon the site herein named to wit:

Bridge T-3 over Little Colorado River, east of Winslow.

Superstructure: 3-165', riveted H. T. steel spans as per superstructure plan on Drawing No. 4183; substructure to be as follows (as per addenda for extras upon the proposal accepted); river piers to consist of two steel cylinders, the lower sixteen feet to be 8' in diam., filled with a rich concrete resting upon twelve piles drives to a refusal of a fifteen tons load each; the upper steel cylinder to be fifteen

feet in length or such that its upper end will be level with a point two feet above the bottom chord of the adjoining A.T. & S.F. R.R. Bridge, the lower end to be 12 ins. above the upper end of the lower tube, to be 6ft. in diam, and filled with a rich concrete mixture connected with the lower concrete by 12 1" twisted reinforcing bars; the two upper cylinders of each pier to be connected by and 18" reinforced concrete wall of an equal length with the said upper cylinders and abutments to consist of two thirty-foot steel cylinders, each, six feet in diam. filled with a rich concrete resting on seven piles driven to a refusal of a fifteen tons load each, the upper fifteen feet to be locked together with an eighteen inch reinforced concrete web wall.

It is further agreed that in the event of any changes being made by the party of the first part, or any extras required by the party of the first part, such charges of extras shall be made or furnished at prices designated in proposals hereto attached and made a part hereof.

It is further agreed that the party of the second part will complete all the work on the bridge hereinbefore described, according to the contract, plans and specifications, on or before six months from the date of this contract and the said party of the first part agrees to permit and allow the party of the second part to have free use of the right of way at or near the place for the erection and construction of trestle work and other purposes, as may be necessary for the convenience of the party

of the second part, in constructing said bridge in accordance with Clause 7 of specifications hereto attached and made a part hereof.

It is also agreed that the said party of the first part will pay to the said party of the second part, at intervals of thirty days apart, eighty per cent (80%) of the percentage of labor performed and material delivered during the preceding thirty days, with the understanding that the last payment due for and on account of the construction and building of the aforesaid bridge shall be made immediately after such bridge is approved and accepted by the party of the first part and all payments are to be made from the bridge bond fund in the manner prescribed by law.

It is also understood and agreed that Clause 3 of the specifications hereto attached and made a part hereof are followed in this contract.

* * * * *

In explanation of the paragraph commencing "Bridge T-3 over Little Colorado River east of Winslow", the bid or proposal of Mesmer to build this bridge called for lighter construction in some particulars than that described in this paragraph. These heavier portions were prescribed by the County Engineer, and by an assistant of the State Engineer, before the contract was signed, and were evidently intended by the County Engineer to meet not only the demands of safe construction, but also the requirements of the Indian Department, in view

of the fact that the government had appropriated $15,000 to be used by the county in paying for this bridge. However, these changes were not considered by the Indian Department as entailing any great additional cost. (Tr. Rec. p. 195, Second Par.) They did meet the approval of the Department, with some slight changes not necessary to be mentioned here so that in every essential respect the bridge was constructed as described in the contract, and as we contend, the contract bound Mesmer to build the bridge just as the contract described it, for the sum of $23,800.00 as proposed in his bid. (By inadvertence this bid was not printed, although sent up as a part of the record. Plaintiff in error requests that it be referred to and considered as though printed herewith.)

The principal controversy arises over the claim of Mesmer, plaintiff in the court below, for $13,-973.65 (Tr. Rec. p. 78, Par VI Amended Complaint) alleged to be due for "extras" said to have been put into the substructure of the bridge at the instance of the county and certain officers of the Indian Department of the United States, hereinbefore referred to. These "extras" as the plaintiff below insisted, represented the difference in cost of the substructure as specified in the proposal, and the substructure as described in the contract.

The plaintiff below contended that in so far as the substructure described in the contract requires heavier or additional material, or more work than

was required in the original plans and proposal, such difference should be paid for according to the "addenda" clause in the proposal, which reads as follows: (See p. 3)

> "If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:
>
> (a) Additional concrete in place ..... $20.00 per yd.
> (b) Additional structural steel in place ..... 7.5c per lb.
> (c) Additional reinforcing steel in place ..... .7c per lb.
> (d) All other work will be done on the percentage basis at actual cost plus 15%"

He bases this contention on that clause "as per addenda for extras upon the proposal accepted" occurring in the description of the substructure as contained in the contract. The defendant took the position that the contract called for the bridge just as described in the contract at the contract price, and that no extras were to be allowed unless "after construction had started, it became apparent that additional quantities were required".

On October 1, 1917, Mesmer filed a purported claim, or demand against Navajo County for "extra material and labor" in the construction of said bridge (Tr. Rec. p 196; Exhibit 9). This claim

on its face demanded a payment of $10,600.00 but as 20% had been deducted pursuant to the terms of the contract it represented a claim of $13,250.00, wholly for "extras". The Supervisors rejected the claim in toto on November 5, 1917, after having referred it to the County Engineer, as appears on the face of the demand. The same demand claimed $17,070.00 as payable "as per original contract and original plans".

On November 5, 1917, Mesmer filed another demand against the County, this time for $17,600.00 "as per original plans and original contract" and for "extras" in the net amount of $12,800.00, or, including the 20% retention, $16,000 for "extras" alone. (Tr. Rec. p. 197-198, Exhibit 10). This demand was also rejected on the same day it was filed. Neither of these demands or claims was itemized or attempted to be itemized as required by law. Paragraph 2434, Revised Statutes of Arizona, prescribes how a claim shall be made out. For convenience, we set out this paragraph:

"Every person having a claim against any county in this state, excepting those referred to in the provisions of this section, shall, within six months after the last item of the account accrues, present a demand therefor, in writing, to the board of supervisors of the county against which such claim or demand is held, verified by the affidavit of himself or agent, stating minutely what the claim is for, and specifying each several items and the date and

amount thereof; provided that the board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within six months after the last item of the account accrued; that nothing herein shall be held to apply to the claims for compensation due to jurors and witnesses, and for official salaries, which, by some express provision of law, is made a demand against the county."

This brings us to the first point wherein we assign error: That no claim for the "extras" sued upon herein was presented to the Board of Supervisors "stating minutely what the claim is for and specifying each several item and the date and amount thereof" within six months after the last item accrued. The entire controversy is over these so-called extras. That is all that is being sued for. (Tr. Rec. p. 159-106).

These "extras", according to the testimony of Mesmer, the plaintiff below, were all included in the demand of November 5, 1917. (Tr. Rec. p. 159, middle of page). All of the extra work had been completed before November 5 (Tr. Rec. p. 157; testimony of Mesmer) and all were included, as Mesmer testifies, in the demand filed on that date. (Same p. 159, although the demand does not disclose any itemization of extras—merely one gross

charge. The question of the validity of the claim was raised by defendant in the court below by numerous objections and motions (Tr. Rec. 102-128-129-133-165-174), all of which were overruled.

The bridge was completed on or before November 1, 1917. It was to have been completed in March. The substructure was all completed during the month of October, or at least before November 5. (Tr. Rec. 157, 7th line from foot of page; testimony of plaintiff).

On December 3, 1917, Mesmer presented another demand (Exhibit No. 11, Tr. Rec. p. 199-201) which we herewith submit:

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Ariz. Dec. 3, 1917.

Mesmer and Rice presents this demand on the County of Navajo for the sum of Sixty-two hundred and four and 62/100 Dollars, balance due to complete the amount of $23,800.00 on contract, for Winslow-Colorado Bridge, together with extras herein listed, the items of which are hereunto annexed.

ITEMS OF THE FOREGOING DEMAND

| | |
|---|---|
| Contract price ..... | $ 23,800.00 |
| Labor drilling holes ..... | 27.14 |
| 1958 4x reinforcing steel ..... | 137.08 |
| Labor furnished engineer..... | 31.40 |
| | $23,995.62 |

| | | |
|---|---|---|
| LESS: | | |
| Previous payments | $ 17,600.00 | |
| Rent of cement mixer | 176.00 | |
| Repairs of cement mixer | 15.00 | |
| | | 17,791.00 |
| | | 6,204.62 |

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgements. Orginal vouchers and receipts must be retained.

STATE OF ARIZONA, }
COUNTY OF NAVAJO, } ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done a performed by me; that the items thereunto annexed are true and correct in every partcular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

(Signed) LOUIS F. MESMER.

Sworn to and subscribed before me December 3, 1917.

R. S. TEEPLE,
Clerk, Board of Supervisors,
Notary Public.

My commission expires:

For value received I hereby assign this demand to:

Demand No. 1

Warrant No. 426.

Filed Dec. 3., 1917. R. S. Teeple, Clerk, Board of Supervisors.

Approved and ordered paid by WI-COLO BRIDGE FUND.

$6204.62

R. W. CRESWELL,
Chairman.

This demand called for the original contract price of $23,800.00, plus "extras" properly itemized, amounting to $195.62, less previous payments, leaving a balance of $6,204.62.

It was presented on December 3, 1917, after a protracted but ineffectual effort on the part of plaintiff and his attorney-in-fact, Popert, to move the Board to reconsider its rejection of the demand of November 5 for "extras". (Tr. Rec. p. 152, et. seq.)

It was obviously the final demand, and its acceptance constituted a final settlement as the County claims and always has claimed. (Tr. Rec. p. 46). The answer sets forth a plea of payment and of accord and satisfaction, and the same pleas are submitted in defendant's motion for judgment. (Tr. Rec. p. 102). At the time the warrant covering this demand was issued, Mesmer gave the County an agreement of indemnity against claims for labor

and material. (Tr. Rec. p. 156; testimony of Mesmer).

On May 23, 1918, Mesmer presented a new claim or demand for "extras". (Ex. 17, Tr. Rec. p. 206) which for the first time attempted to comply with the law by setting forth items of the alleged extras. This, as stated by counsel for plaintiff was filed "so that the Board of Supervisors might know the items of the November demand". (Tr. Rec. p. 134). This was filed long after the six months period of limitation had elapsed, and was objected to on that ground (Tr. Rec. 133-4).

The defendant below plead the statute of limitation in bar (Tr. Rec. p 44-103) upon the ground that this action was originally begun in equity on the 31st day of May, 1918, while the claim upon which the action is avowedly founded was finally rejected November 5, 1917; therefore, under Par. 2439, R. S. A., 1913, the action was barred, not having been brought within six months after the final rejection of the claim on November 5, 1917. Paragraph 2439 is as follows:

"A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after final action of the board, but not afterward, and if in such action lowed, on presentation of the judgment the board judgment is recovered for more than the board almust allow and pay the same, together with the

costs adjudged, but if no more is recovered than by the board allowed, the board must pay the claimant no more than was originally allowed. A claimant dissatisfied with the amount allowed him on his account may accept the amount allowed, and sue for the balance of his claim, and such suit shall not be barred by the acceptance of the amount allowed."

It may be proper to state at this point that no demand ever filed, excepting the demand of Dec. 3, 1917 (Ex. no. 11, Tr. Rec. 199) was sufficient to give the Board of Supervisors jurisdiction, not being itemized, and as the demand of May 23, 1918, was not filed until more than six months after the last item had accrued, it could not confer jurisdiction even if sufficiently itemized. The bridge, as finally completed, cost the county of Navajo $41,000.00, (Tr. Rec. 185) including the $15,000.00 appropriated by the Government. This is undisputed. The contract and specifications provided for certain spans (Tr. Rec. 27). These did not reach across the river, and the county was obliged to build another span and the necessary approaches, all of which expense was additional to the amount paid to Mesmer. (Tr. Rec. 186-7).

From first to last the Supervisors steadfastly refused to recognize any obligation to pay for any extras whatever except those ordered during construction by the county's inspector and amounting to $195.62 (known as the "Dubree extras" (Tr. Rec. 153-165) and the "Meritt extras" which

amounted to $1307.00 (Tr. Rec 103). The sum of $17,600.00 credited on the demand of December 3, 1917, as "previous payments" includes all payments theretofore made by the Board of Supervisors to Mesmer on this bridge, and it also shows that all of such payments were treated by both parties as applying to the contract price of $23,800.00. It is not claimed anywhere in the case or by anybody that any "extras" have ever been paid for, or that any allowance has been made or credit or recognition given by the county for any "extras" other than the extras specified in the demand of December 3, 1917, $195.62.

The contract of indemnity above referred to was admitted in evidence as Defendant's Exhibit B Tr. Rec. 88). This was also omitted by inadvertence from the printed record, through our misunderstanding. We supposed that the entire record as sent up would be printed. The praecipe will show that we requested all exhibits to be sent up, and we therefore ask that it be referred to and considered. The connecting testimony will be found on pages 162-3 of the printed transcrpt.

We think the issues cannot be more concisely stated than as set forth in our Motion for Judgment, as follows:

1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plain-

tiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435, Revised Statutes of Arizona.

2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as requred by the laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23d, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings.

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5th, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called "extras" which constitute the basis of plaintiff's claim, were, with the exception of materials of the value of $1,307.00 ordered after construction had commenced, speci-

fied and required to be furnished by plantiff on the contract itself, under the contract price of $23,800.00.

6. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agreement with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge and which were set forth in the contract, were to be paid for as "extras."

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction.

## ASSIGNMENT OF ERRORS.

Comes now the plaintiff in error, Navajo County, by its attorneys, and offers its assignment of errors.

Plaintiff in Error says that in the record and proceedings herein in the United States District Court, for the District of Arizona, there is mani-

fest error, to the great prejudice of the Plaintiff in Error, in this, to wit:

ASSIGNMENT OF ERROR NO. I

That the United States District Court for the District of Arizona erred in overruling defendant's objection to the introduction of plaintiff's Exhibit No. 1, being the call for bids of Navajo County for the construction of certain bridges, upon the ground that it was immaterial, it appearing that long after that call was made a contract was signed with full specifications and that a mere proposal for bids would have no bearing whatsoever on that contract one way or the other, no matter what it might be.

ASSIGNMENT OF ERROR NO. II

That said District Court erred in overruling defendant's objection to what purported to be a copy of an original report addressed to the Supervisors of Navajo County, and purported to be signed by Chas. E. Perkins, County Engineer, and introduced as plaintiff's Exhibit 4, for the reason that it was a copy. That no foundation had been laid for the introduction of secondary evidence. That it bore neither date or signature or was it in anywise identified as an official report. That it was irrelevant, incompetent and immaterial. That it imported no verity or authenticity. That although purporting to have been made by the County Engineer, he was not authorized to speak for, or bind, the Board of Supervisors in any way at that time.

A copy of said exhibit is attached to the Bill of exceptions (Tr. Rec. 208) and marked Plaintiff's Exhibit 4.

ASSIGNMENT OF ERROR NO. III

That the said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to Wallace Ellsworth, the Clerk of the Board of Supervisors of Navajo County, called as a witness for the plaintiff:

"MR. STONEMAN.—Under what date of the meeting of the Board of Supervisors is that minute entry made?

A. Under date of August 7, 1916.

Q. Read that into the record.

Mr. CLARK.—Now, if the Court please, we shall object to that on the ground that it is irrelevant, incompetent, and immaterial and that on its face it was a minute of the Board of Supervisors made prior to the execution of the contract between the plaintiff and defendant here and that different conditions may have been talked of or discussed or placed of [160] record prior to that time having no bearing on the contract itself and are no part of it and, therefore, ought not be admitted in evidence unless shown in the contract itself.

The COURT.—What does it purport to be?

Mr. STONEMAN.—The purport of it is that

the bid of Mesmer and Rice, being the best bid, is accepted and approved subject to the approval of the contract, specifications and plans by the United States Indian Department.

Mr. CLARK.—We think your Honor can see that it is immaterial. The contract or the bid must have been accepted or there would have been no contract and, if the latter part of this, which refers to the Indian Department, is in the contract itself, which it is not, then this might shed some light on it but, inasmuch as it is not and everything pertaining to the Indian Department was carefully stricken from the contract before signing, we say this can have no bearing.

The COURT.—Don't you put them upon proof by the allegations of your answer as to the very subject of the execution of this contract?

Mr. CLARK.—Not as to anything prior to the date of the contract itself and we confine our answer to that. There are certain allegations in the complaint as to what transpired afterwards, which, of course, are material and we have denied those in so far as we have seen proper. In any event, he would not be put to proof of any immaterial matter.

The COURT.—No. The objection is overruled.

To which ruling counsel for defendant then

and there excepted and the witness read the record in question as follows:

'A. The bid of Mesmer & Rice of Los Angeles, California, being lowest and best bid received for the construction of bridge across the Little Colorado River near Winslow at a cost of $23,800.000, the same is accepted and approved subject to approval of contract, specifications, and plans therefor by United States Indian Department, which department expects to pay one-half of the cost of construction of same bridge."

ASSIGNMENT OF ERROR NO. IV.

That the said United States District Court erred in overruling defendant's objection to the cross-examination by counsel for plaintiff of R. C. Creswell, formerly a member of the Board of Supervisors of Navajo County, and called originally by plaintiff for the purpose of cross-examination under paragraph 1680, R. S. A., 1913, [161] which paragraph reads as follows:

"A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination, at the

instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony. Such witness when so called may be examined by his own counsel, but only as to the matters testfied to on such examination."

for the reason that said witness was not then a supervisor, that he was in no official position of any kind or character and that anything he might testify to at that time should proceed under the usual rule as plaintiff's witness without tht right of cross-examination; that when the official relation has ceased one who has been an officer may be a witness only as other witnesses. That the witness was then a private citizen not bound by official sanction.

Whereupon, the following colloquy occurred:

"The COURT.—Well, the rules of evidence in the state courts do not apply in the Federal court.

Mr. STONEMAN.—No, I know that.

The COURT.—Q. During all of these proceedings, Mr. Creswell, were you a member of the Board?

A. Yes, sir. That is, during the time the contract was being let and settled up.

The COURT.—You are offering him for cross-examination?

Mr. STONEMAN.—Yes, sir. I don't want necessarily to be bound. I don't know what he is going to say. I never talked to him, being an adverse witness.

The COURT.—You are merely going to examine him as to this contract and his participation in it?

Mr. STONEMAN.—Yes, sir. [162]

The COURT.—Well, the objection will be overruled. However, you will be limited to that contract and matters that occurred before he retired from the Board.

Mr. STONEMAN.—Yes, sir.

To which ruling counsel for the defendant then and there excepted.

THEREUPON said witness testified among other things, as follows:

'Mr. STONEMAN.—Q. Mr. Creswell do you remember receiving during the month of September or perhaps October, 1916, a letter addressed to you as chairman of the Board of Supervisors by E. B. Merritt, Assistant Commissioner of Indian Affairs? A. Yes, sir.

Q. Would you recognize a copy of the letters, if you saw it? I hand you what we think is a copy of the letter and ask you if you received the original?

A. Yes, sir. I think I received the original of that, if I remember.

Q. Do you know where the original is, Mr. Creswell? A. No, sir, I do not.

Q. You left, I suppose, with the Board of Supervisors?

A. Well, I either left it there or a copy there. This was sent direct to me at Winslow.

Q. Did you communicate the contents of that letter when it was received by you to the Board of Supervisors? A Yes, sir.

Mr. STONEMAN.—We offer this in evidence now and ask that it be marked Plaintiff's Exhibit 6.

Mr. CLARK.—That has been marked plaintiff's exhibit already.

Mr. STONEMAN.—That has been marked plaintiff's exhibit for identification.

Mr. CLARK.—We object to it on the ground that it is immaterial and hearsay.

The COURT.—Q. How did you get it—through the mail? Did it come to you through the mail? A. Yes, sir.

Mr. CLARK.—Please add to that objection that it is incompetent. [163]

The COURT.—Objection is overruled.

To which ruling of the Court the defendant then and there excepted.'

THEREUPON said purported letter was admitted in evidence as Plaintiff's Exhibit No. 6, and is attached to the Bill of Exceptions (Tr.

Rec. 193) as such exhibit duly numbered for identification.

WHEREUPON said witness further testified as follows:

'Mr. STONEMAN.—Q. I hand you what purports to be a copy of a communication dated at Holbrook, August 9, 1916, addressed to the Board of Supervisors of Navajo County, purporting to be signed by Thomas F. Nichols for the State Engineer, and ask you if you ever saw the—ask you to examine this copy and state whether or not you ever saw the original of it?

A. It has been so long that I don't know whether I could recall the exact wording but he made such report I know. (Witness reads document.) As far as I know, I think it is a copy of the report from Mr. Nichols, State Engineer.

Mr. STONEMAN.—We offer this copy to which the witness has just testified and ask that it be marked as a plaintiff's exhibit with the appropriate designation.'

(Counsel for plaintiff asked counsel for defendant it they had the original of this report, and were informed that they did not.)

The copy to which the witness had just testified was then offered in evdence, to which offer counsel for defendant objected on the ground that on its face it was a report made prior to the filing of the contract. That all prior matters were deemed to be incorporated in it. That

it was immaterial, irrelevant and incompetent; that it is hearsay as it stands, without authenticity. Which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON said copy was admitted in evidence as Plaintiff's Exhibit 13, a copy of which exhibit duly numbered for identification is attached to the Bill of Exceptions [Tr. Rec. 201) and asked [164] to be read and considered as a part hereof.

THEREUPON the plaintiff offered in evidence further testimony on the part of said witness as follows:

'Mr. STONEMAN.—Q. When did you see the demand that I filed on behalf of Mesmer and Rice with reference to the time that some kind of a meeting, legal or otherwise, was held by the Board of Supervisors on or about the 23d day of May, 1918?

A. Well, I don't remember those dates at all.

Q. You remember the meeting being held, don't you?

A. I remember hearing them talk about it, yes, but I say, I don't remember being at that meeting.

Q. Who talked to you about it?

A. I think Mr. Owens did.

Q. What did Mr. Owens say?

To which question the counsel for defendant

then and there objected on the ground that it was hearsay and immaterial. His objection was by the Court sustained.'

THEREUPON the following question was propounded by counsel for plaintiff.

Q. How did Mr. Owens or Mr. Freeman happen to speak to you at all about it, do you know?

To which question counsel for defendant made the objection that it was immaterial and that it called for a conclusion. Which objection was by the Court overruled. To which ruling, defendant then and there excepted and the witness thereupon testified as follows:

'A. Well, as I remember, Mr. Owens remarked that Mr. Stoneman was over there and wanted to reopen that case of Mesmer & Rice, and they could not see any necessity of reopening it. They said they had paid them in full.

Q. How did you first acquire any information as to whatever was done at this meeting?

To which question counsel for defendant objected on the ground that it was immaterial.

WHEREUPON the following colloquy ensued: [165]

'The COURT.—He might have acquired the information from the record.

Mr. CLARK.—Then it would be more objectionable. It would be pure hearsay if he received it from a record. The record would be the evidence.

The COURT.—Do you contend that the Board of Supervisors or any other board or public body may hold a special meeting and solemnly transact business that affects the rights of individuals and fail to record it and preclude the party from proving it after they have acted upon it.

Mr. CLARK.—No, sir, and we say that nothing of this kind has been done by this Board at any time. We will make this suggestion. First, that this meeting was not a meeting of the Board of Supervisors as such. It was called as a mere conference at Mr. Stoneman's request and the telegram upon which it was based was dated the 19th day of May, 1923, and this meeting was held at his request on the 23d, only four days between the date of the telegram and the date of this meeting. Now at this meeting, your Honor, the Board of Supervisors could not legally have taken any action upon any claim to the prejudice of this plaintiff. The statutes require that every claim be presented at a regular meeting, not a special meeting. A special meeting may not be held for the purpose of considering a claim and we think counsel is aware of that and, if no action was taken at that meeting, it was because among other things, that the claim was presented to the Board for the first time then and at a specal meeting, at which they

could not legally consider it. Now, I am not saying what counsel may have understood. I am stating the situation as it is, your Honor, and we are within our rights in objecting to all of this testimony. We haven't a scrap of paper nor a word of testimony as to anything that happened that is not wide open to counsel and I think they too appreciate that. If certain things are gone, they are gone from us as well as from him.'

Which objection was by the Court overruled.

To which ruling defendant then and there excepted and the witness was then permitted to testify as follows:

A. Well, just as I stated, I think Mr. Owens told me he had been over there—that Mr. Stoneman had been over there to Holbrook and talked with him and Mr. Freeman over this claim of Mesmer & Rice.

The COURT.—Mr. Creswell, you called that special meeting, did you not?

A. I sent that telegram that I got from Mr. Stoneman to the Clerk and asked him to 'phone the other two members.

Q. Yes, and they were all present?

A. The other two were present, but I can't recall to my mind that I was there. [166]

Q. You say you were not there?

A. I don't think I was there, Judge.

Q. Do you know that you were not there?

A. No, I was not there."

ASSIGNMENT OF ERROR NO. V.

That said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to C. E. Owens, a member of the Board of Supervisors of Navajo County, who had been called originally by plaintiff for cross-examination under paragraph 1680, R. S. A., to wit:

"Mr. STONEMAN.—Q. That was the meeting at which the warrant for $6,204.00 was paid?

A. Well, I don't remember as to the date. I remember that meeting, yes.

Q. Now, the $6,204.00 was a part of the amount that has been claimed by Mesmer & Rice before December 3, wasn't it?"

upon the ground that the question called for a conclusion of the witness and that the transaction must speak for itself from the record as made.

"THEREUPON said witness was permitted to testify as follows:

A. This $6,204.62 was the final payment that was due, according to our understanding on the contract on that bridge and this was the demand that we approved and paid.

Q. Now, prior to that time, this demand of

November 5, had been presented, hadn't it, and you rejected it? A. Yes, sir.

Q. I am handing the witness Plaintiff's Exhibit 10.

(Being the demand filed by plaintiff against the defendant county on November 5, 1917, (Tr. Rec. 197).)

Now, isn't it true, Mr. Owens, that the $6,-204.65 that was finally paid to Mr. Mesmer on December 3, 1917, was intended to—by the Board of Supervisors to be a compromise and a settlement of [167] all the money that had been demanded by Mesmer & Rice in November or at any previous time?

A. No, sir, I do not understand it that way.

Q. How do you understand it?

A. I understand that $6,240.00 was the last payment due on the contract and the reason that we rejected this thing because there was no evidence there to show us where these things were placed. There is nothing attached to the demand to give us any evidence why we should pay that extra amount."

ASSIGNMENT OF ERROR NO. VI.

That the said United States District Court erred in overruling defendant's objection to the following question propounded to the said witness C. E. Owens during the cross-examination last above referred to, to wit:

"Q. But you knew that the $6,204.00 which you allowed on December 3 was included in the demand of November 5, didn't you? What was your answer?"

for the reason that it must appear, if it appears at all, from the face of the demands; that the statute requires that these demands be itemized, stating minutely what each item is for and assuming that they have followed the law, it will appear from the face of these demands whether the last one on December 3d (Tr. Rec. 199) includes any part of those theretofore presented and rejected.

Thereupon counsel for plaintiff changed the form of his question to read as follows:

"Mr. STONEMAN.—Q. Now, didn't that claim of November 5 include the amount of money which you admitted you owed him, $6,204.62?"

To which question defendant interposed the objection already made, together with the further objection that the question calls for a pure conclusion of the witness.

Thereupon the following colloquy occurred:

"M. STONEMAN.—I will change the question, Mr. Clark.

Q. Didn't you so understand on December 3 that that $6,204.62 was included in one or the other—in the demand of November 5?

Mr. CLARK.—That is already objected to. We certainly object to it. An understanding is

something so intangible [168] we can't reduce it to this record. It must appear by the face of those demands whether or not the later demand of December 3 was included in any portion of the former, and if the demands were properly made, and I am assuming that they are, they will so show one way or the other.

The COURT.—If this witness knows, why can't he testify to it?

Mr. CLARK.—He asks him to testify to an understanding which understanding must appear from the face of the demands themselves under the legal rule.

The COURT.—Well, the first question was—he asked him if it was not included and it was not part. He changed the question.

Mr. CLARK.—That is the thing that this Court should determine from an inspection of the demands themselves whether it is or not.

The COURT.—Well, I may not be able to determine.

Mr. CLARK.—Then this witness surely, we claim, would not have the right, if the demands were put in such shape that this Court could not determine it—we ought not to be bound by the fallacious conclusion, as we think it would be, of any witness.

Mr. STONEMAN. — May it please your Honor, I withdraw that question and ask him questions with regard to the claim of October 1.

Q. The amount of $6,204.00 which you paid to Mr. Mesmer on December 3, 1917, was included in the demand of October 1 or, in this case, Plaintiff's Exhibit 9, was it not?

Mr. CLARK.—That is the same question in slightly different form and we object to it upon the same grounds."

Which objection was by the Court overruled, to which ruling the counsel for defendant then and there excepted, and the witness was permitted to answer as follows:

"A. Well, whether that part of it was included in that or not, I can't say at the present time but these demands were fixed up in such a way that we as Board of Supervisors did not feel like we have a right to honor them and therefore, we reject them as they was in the whole amount.

Mr. STONEMAN.—Q. Why did you reject the demand of October 1 with the items of the different amounts claimed?

Mr. CLARK.—Well, now, we object to that.

Mr. STONEMAN.—In what respects does not—did it warrant the action of the Board of Supervisors?

Mr. CLARK.—The witness has answered that question once. [169]

The COURT.—He has asked as to November 5 but he has not as to October 1.

Mr. STONEMAN.—That claim of October 1,

as your Honor will recall, was deferred—the action on it was deferred until November.

Mr. CLARK.—Yes, that is the record. Now, in the first place, in support of our objection, we say that the witness no supervisor is bound to give a reason for the rejection of a claim; that their reason ought to appear from the claim itself and we say that it does appear plainly on the face of this demand.

The COURT.—I don't know of any rule that would preclude him from giving his reasons. If he knows why the Board acted in the way in which it did, I think he has a right to testify. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Our reasons for rejecting this demand is the same as the other. There is nothing there to satisfy the Board as to the evidence of these things that were passed on there. There isn't an O. K. there of the inspector or nothing attached to that bill where they incurred that extra expense and we could not honor a demand like that."

## ASSIGNMENT OF ERROR NO. VII.

The said United States District Court erred in overruling defendant's objection to the following question propounded by the said witness, C. E.

Owens, in the course of the cross-examination last above referred to:

> "Mr. STONEMAN.—Well, you refer only to the extra expense. How about the structural steel, 147 tons at $120.00 a ton, amounting to $17,640.00? What is the objection to that?"
>
> (The item referred to in the demand of Oct. 1, 1917 (Plaintiff's Exhibit 9) is not charged for therein as an extra but as material delivered as per original contract.) (Tr. Rec. 196.)

for the reason that if there were any informality or defect in the demand it was not the fault of defendant. That if a certain number of tons of steel were charged for in that demand, before the Board could pay it there would have to be a showing by some agency or direction of the County Engineer, showing how much steel would have been required under the contract or under the proposal, so that if [170] plaintiff had furnished more that would show why demand was made for so many tons of steel.

The witness was thereupon permitted to testify as follows:

> "A. Because the demand was not itemized sufficiently and it claimed more money on there than they were entitled to and we demand an itemized demand."

ASSIGNMENT OF ERROR NO. VIII.

The said United States District Court erred

in refusing to strike from the record Plaintiff's Exhibit No. 17, being a purported demand presented by the plaintiff to the Board of Supervisors or to certain members of the Board on the 23d day of May, 1918, on the ground that the alleged statement or demand it not itemized as required by the statutes of Arizona. Secondly, that at the time it was presented there was no indebtedness of any kind or character on the part of Navajo County to this plaintiff. Third, that this claim is not sued upon or mentioned in any way in the complaint as will appear by reference to page 10 of the amended complaint where in it is stated that the demand of this plaintiff was presented on or about the 3d day of December, 1917. That there is no showing in the complaint that this demand was ever presented or filed within six months from the time the alleged claim, or any item in it, arose. Lastly, that it is irrelevant, incompetent and immaterial.

The introduction of said exhibit was thereupon allowed to stand and a copy of same is attached to the Bill of Exceptions (Tr. Rec. 206) properly marked as Plaintiff's Exhibit 17.

## ASSIGNMENT OF ERROR NO. IX.

The said United States District Court erred in overruling defendant's objection to the following question propounded to R. S. Teeple, witness called in behalf of plaintiff, to wit:

"Mr. STONEMAN.—.Q Do you remember

seeing a demand presented by Mesmer and Rice on May 17, for $17,856.00 upon which that warrant was paid and shown by what purports to [171] a carbon copy of a demand, which I hand you?

The COURT.—Is that 1917?

A. Yes, sir. I believe I recollect this, Mr. Stoneman. I can't say as to those figures.

Q. No, wasn't it upon this demand that that warrant of $10,000 was issued?

A. That is my recollection, although a new demand might have been made out.

Q. You recollect that it was this. We offer this in evidence upon the identification of it by this witness and ask that it be marked a separate exhibit."

for the reason that it is irrelevant, and incompetent and that the complaint is not based either wholly or in part upon any demand of May 17, 1917.

Thereupon Mr. Stoneman, for plaintiff, made the following explanation:

"Mr. STONEMAN.—It is offered not for the purpose of that—that purpose at all. It is offered for the purpose of showing that the Board of Supervisors has, at least in this instance, made an allowance upon—without a separate demand covering the amount allowed being presented."

Said purported demand was thereupon admitted

in evidence properly marked and numbered for identification.

ASSIGNMENT OF ERROR NO. X.

That said United States District Court erred in sustaining the motion of plaintiff to strike the following testimony of the said witness R. S. Teeple, upon defendant's cross-examination of him respecting the demand of plaintiff against Navajo County, dated December 3, 1917:

> "A. Now, calling your attention, Mr. Teeple, to the line starting with the word "less" purported to be credits on this demand, opposite which is a total of $17,000.00, as I remember it?
>
> A. Yes, sir. $17,600.00.
>
> Q. $17,600.00 is right. Now I will ask you if that amount does not include all payments of every kind and character theretofore made by the Board of Supervisors to the plaintiff on this bridge?
>
> A. It was so intended. [172]
>
> Q. I am asking you if it does not?
>
> A. It does, yes."

Upon plaintiff's objection to said question, on the ground that the witness was not qualified to answer, although it appears in the record that on December 3, 1917, the witness was the Clerk of the Board of Supervisors of Navajo County.

ASSIGNMENT OF ERROR NO. XI.

The said United States District Court erred in sustaining the motion to strike of plaintiff, certain testimony of the said witness, R. S. Teeple, as to additional work done upon the bridge in question by the County in order to complete it.

Upon the ground that it is contrary to the record made in this case, in that the record shows in this case that the plaintiff claims the payment of $6,204.00 in final acceptance and payment of all demands upon the construction of that bridge, and that it is incompetent for the purpose of disputing the record that the Supervisors did accept the bridge and finally paid for it. Said testimony being so stricken, was as follows:

> "A. On the east side, a long piling or trestle approach was constructed. On the west end, another steel span and on the west or south bank of the river piling driven in and protection work to keep it from washing, and dirt approaches also on the west end, and perhaps, some dirt on the east end. This extra steel span was built by the Omaha Structural Steel Bridge Co. and it followed the work done by Mesmer & Rice, and that work was necessary to complete the bridge so that it could be used."

ASSIGNMENT OF ERROR NO. XII.

The said United States District Court erred in overruling defendant's objection to the following

question propounded to the plaintiff, Louis F. Mesmer, while testifying in his own behalf upon direct examination, as to certain conversations alleged to have occurred about August 8, 1916, and prior to the execution of the contract in question which [173] was made on September 5, 1917, said conversation purporting to have been made with C. E. Perkins, County Engineer:

> "Mr. STONEMAN.—Now, then, what conversation, if any, led up to the ——— and what reasons were there why the payment for the additional work suggested by the County Engineer should not be included in the $23,-800.00? In other words, I mean why was it the provision put in there that the substructure should be constructed according to the *addenda* rather than that it should come out of the $23,-800.00?"

Upon the ground that it involved something that could only be determined by the Board of Supervisors, and anything that the County Engineer might have said as to that could not be binding upon the defendant at all. That it was incompetent for purpose offered or for any purpose.

ASSIGNMENT OF ERROR NO. XIII.

That said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff during the same examination last above referred to:

"Mr. STONEMAN.—At that time did Mr. Perkins say anything to you about the possibility of further charges by reason of the requirements that might be made by the representative of the Indian Department?"

Upon the ground that additional quantities required before the contract was made and signed, and particularly before any construction had started were immaterial. That they were not matters coming within what counsel calls *addenda*. For the reason that all of these things to which the witness has just testified as being additional quantities and sizes, are in terms set forth in the contract and that plaintiff was to furnish each one of these things so mentioned and which are mentioned in the report of the County Engineer and in the report of Mr. Nichols. For the further reason that the *addenda* to which counsel has referred contains this provision, which is in the contract as well as in the proposal:

"If, after construction has commenced it appears that additional quantities are required, they [174] shall be paid for as follows":

and that the contract itself provides that the *addenda* shall only become effective after construction is commenced, if it be apparent that additional quantities are required.

ASSIGNMENT OF ERROR NO. XIV.

The said United States District Court erred in

denying defendant's motion to strike the following testimony:

> "Mr. STONEMAN.—Well, what influence did it have and why was the phrase 'as per *addenda* for extras upon proposal accepted' inserted in the contract as finally signed, in so far as the substructure work was concerned?
>
> A. So that any alterations made in the substructure other than—over those that were shown on the original plans would be paid for as per unit prices shown in the *addenda.*

On the ground that the answer was a conclusion by way of interpretation of the contract which forestalls the Court in its construction. The contract being clear, plain and unambiguous.

ASSIGNMENT OF ERROR NO. XV.

That the said United States District Court erred in denying defendant's motion to strike the following testimony:

> "Mr. STONEMAN.—Was there any attempt by either of you or Mr. Perkins at that time to reach a figure as to what additional money would be required to construct the bridge according to the suggestions of the County Engineer?
>
> A. Yes, the quantities, the cubic yardage of concrete was figured, the number of extra piles was figured, the amount of reinforcing bars was figured and all of the various items that go

to make up the alterations were estimated and they were added on the contract price of $23,-800.00 an dthen that amount subtracted from the total amount of $28,000.00, to see whether those alterations from the total cost was inside of the available money for the work."

On the ground that said answer was wholly unanticipated, irrelevant, incompetent and immaterial. [175]

ASSIGNMENT OF ERROR NO. XVI.

That the said United States District Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit 21, purported to be a plan showing the difference between the plans and specifications upon which the bid was submitted, and the plans and specifications upon which it was agreed the substructure should finally be built. Upon this offer the following question was propounded and the answers following said questions were given:

"Q. Are these the plans that you have testified to as showing the changes in the substructure from the plans of construction of the substructure that was included in your bid?

A. They are. They show the difference between the two river piers on the original plan as proposed and as built."

The objection was upon the ground that it did not

appear from anything the witness had stated that the offered plan is anything more than one prepared by Mr. Popert. That it does not show that the County Engineer had anythng to do with it.

Whereupon, the Court made the following observation:

> "The COURT.—No, it does not show it was submitted to him or made with his approval or changes were suggested—
>
> Mr. STONEMAN.—It is not offered for that purpose, if your Honor please. It is offered for the purpose of in a little while of forming the basis of the computation of the extra cost under the flat charges of the additional steel and concrete in place required by the changes.
>
> The COURT.—You expect to show that the work was done in accordance with these plans and changes?
>
> Mr. STONEMAN.—Yes, sir."

Thereupon counsel for defendant added to its objection that the offered exhibit would be selfserving and not under the authenticity or approval of the County Engineer or anyone else who might bind the County, and would be in the nature of hearsay as well as incompetent. [176]

Thereupon, notwithstanding said objection, said Exhibit 21 was admitted and the witness was permitted to testify fully regarding the same, and the computations based thereon.

ASSIGNMENT OF ERROR NO. XVII.

The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by plaintiff's counsel:

> "Mr. STONEMAN.—In answering the next question, I will ask you, please, always, in each instance, Mr. Mesmer, give the cost first of the construction under your own plan and specifications and then give the added cost as shown by the changes required by the County Engineer, if you can do that."

Upon the ground that in the contract there is a certain substructure definitely and specifically provided to be built by the plaintiff for Navajo County, and that the words in the contract: "substructure to be as follows: (as per *addenda* for extras upon the proposal accepted)" refer only to extras beyond the substructure that is definitely contracted to be built in the contract, no part of which is designated as an extra. That this provision as to extras has no application except to things added to the contract after actual construction shall have commenced, and that it is immaterial. Notwithstanding said objection, the witness was permitted to testify fully to comparative costs.

ASSIGNMENT OF ERROR NO. XVIII.

The said United States District Court erred in overruling defendant's objection to the following

question propounded to Louis F. Mesmer, the plaintiff, by his counsel:

> "Mr. STONEMAN.—Q. Well, start in on the morning of that day (December 3, 1917), and tell the Court, as far as may be permitted to tell, what happened, and what was done between you and Mr. Popert and the Board of Supervisors."

On the ground that the plaintiff is precluded by the receipts, which is a final one, and by his undertaking of the [177] indemnity given on that date and by all of the circumstances surrounding this case. That the receipt constitutes, or that demand and the warrant for its payment constitutes a full and final payment of all demands.

Notwithstanding said objection, the witness was permitted to restate fully the version of what happened before the Board of Supervisors on December 3, 1917.

ASSIGNMENT OF ERROR NO. XIX.

The said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff, Louis F. Mesmer, by his counsel:

> "Mr. STONEMAN.—Q. Wasn't the matter being discussed between you and the Board of Supervisors, as to whether or not the Board of Supervisors, should pay the whole of the claim as it was included in the demand of November

5, or whether they should pay part of it, or whether they should stand upon their original rejection of the whole claim?"

On the ground that it was leading. Which objection was by counsel for plaintiff then and there confessed, following the comment of the Court that it was leading. Notwithstanding said objection the witness was permitted to testify as follows:

"A. The Board would only pay the amount necessary to complete the original plans and specifications, and they agreed to pay the other extras with the exception of the Nichols—or the Perkins' extras, which they would not pay, so that the money that they allowed was in—was an application of first—on the former.

Q. Well, what I want to know, what was being discussed was it a previous demand or was it?

A. Well, we were discussing the extra work involved in November—in the November discussion. All of the extra work had been completed before.

The COURT.—Q. November claim?

A. Yes, the extra work had been completed then.

Mr. STONEMAN.—Was the amount of $6,204.62, which you finally accepted on December 3, an amount that was included in the November demand?

A. Well, part of it was, yes." [178]

ASSIGNMENT OF ERROR NO. XX.

The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel:

> "Mr. STONEMAN.—Q. Do you know why the words, 'together with extras herein listed' was placed in there?"

(Referring to the demand of Dec. 3, 1917.) (Tr. Rec. 199.)

On the ground that it called for a conclusion and that the instrument itself is susceptible of easy interpretation.

Thereupon, the following proceedings were had:

> "Mr. STONEMAN.—The witness says that he directed that to be put in there.
>
> Mr. CLARK.—I understand that he did.
>
> The COURT.—Yes, but the instrument itself does not show why that language was used. It think it is proper evidence in explanation of the document. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

> "A. Yes, the reason for that wording was to differentiate the extras mentioned and specifically enumerate here from the Merritt extras or the extras involved by reason of changes in the plans at the specific request of Mr. Merritt of the Indian Department and the ex-

tras involved by reason of the changes in the plans at the suggestion of Mr. Perkins."

ASSIGNMENT OF ERROR NO. XXI.

The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel, upon redirect examination:

"Mr. STONEMAN.—Mr. Mesmer, can't you put the conditions under which you state that you were paid $6,204.00 by the Board of Supervisors on December 3, 1917—Will you please state to me again your understanding of the conditions under which that payment was made and how you accepted it?"

Upon the ground that is was not proper redirect; that it had been fully stated by this witness more than once what his understanding was in both direct and cross-examination. [179] That it called for a conclusion of the witness. That there was not any ambiguity in the contract. That it is susceptible of easy interpretation and speaks for itself.

Notwithstanding said objections the witness was thereupon permitted to testify as follows:

"A. The Board—I will give in conclusion this thing. The Board said to me as follows: 'We will give you the difference between the amount of $23,800.00 and the amounts we have already paid you, and in addition thereto, we will give you the Dubree extras and we will give you the

Merritt extras, but we won't give you the extras involved by reason of Perkins' changes' and I said: 'Gentlemen, that won't do. I will tell you what I will do. I will take the difference between the $23,800.00—'

Q. $23,000.00?

A. Yes. '—and what you have already paid me and the Dubree extras but I won't take the Merritt extras, because it will cloud the question of the Perkins' extras, which are involved with, and a part of, you might say, of the Merritt extras. It is difficult between the two lines to draw just where Merritt's and Perkins' come together."

ASSIGNMENT OF ERROR NO. XXII.

The said United States District Court erred in denying the following motion to strike made at the conclusion of the examination of the said Louis F. Mesmer, plaintiff:

"Mr. CLARK.—Before any further testimony is put on, we desire to move that all of the testimony of Mr. Mesmer as to the value of these extras claimed by him be stricken on the ground: First, that all those things that he set forth of what was required by the Indian Department are provided for in the contract itself; secondly, on the ground that no demand covering these extras, as testified to by Mr. Mesmer, was filed with the County of Navajo in the manner and form as required by the

statutes of Arizona within six months from the date of the last item."

ASSIGNMENT OF ERROR NO. XXIII.

The said United States District Court erred in overruling defendant's objection to the following question propounded by plaintiff's attorney to W. H. Popert, witness for the plaintiff:

"Mr. STONEMAN.—Could the bridge have been constructed for $23,800.00 exclusive of these modifications." [180]

upon the ground that it was immaterial.

Thereupon, after several intervening questions and some discussion the witness was permitted to, and did, answer "No."

ASSIGNMENT OF ERROR NO. XXIV.

The said United States District Court erred in overruling defendant's objection to the following question propounded to W. H. Popert, witness for the plaintiff:

"Mr. STONEMAN.—Q. Now with reference to the phrase, as it appears in the contract by Plaintiff's Exhibit 3, 'substructure to be as follows: as per *addenda* for extras upon the proposal accepted.' Do you know how that phrasing happened to be inserted, not only in this memorandum, being Defendant's Exhibit 'A,' but finally in the contract? Do you know? Say yes or no, please. A. Yes, I know.

Q. Now, go ahead and tell the reason why."

Upon the ground that it was immaterial. Notwithstanding said objection the witness was permitted to testify as follows:

> "A. As I remember, in the original pencil draft, of which this is, I believe, a copy, we wanted to be sure that any materials to be furnished above that shown on the original blue-print and called for in the original proposal should be paid for irrespective of the description which might follow here. I can't say whether I inserted this or the Engineer or the Attorney but it was agreed upon at that time in the conference that these words should appear in the contract or words similar in effect which would be satisfactory to the County Attorney. Does that answer the question?"

ASSIGNMENT OF ERROR NO. XXV.

The said United States District Court erred in overruling defendant's objection to the following question propounded to the same witness, W. H. Popert, during his direct examination:

> "Mr. STONEMAN.—Is there any reason why it was not possible at that time to say that the bridge should be built for $23,800.00, or for any other sum?"

On the ground that it called for a conclusion.

Notwithstanding said objection the witness was permitted [181] to testify as follows:

"A. The proposal called for the construction of a particular bridge for a particular price. It was known that there would be certain modifications to be made. It was not possible to anticipate those modifications before the contract was executed. Further, the contractor beleved that it would not be legal to modify the price named in the original proposal."

ASSIGNMENT OF ERROR NO. XXVI.

The said United States District Court erred in overruling defendant's objection to the following question asked of said witness, Popert, upon his direct examination:

"Q. Was there any discussion between you and Mr. Mesmer and Mr. Perkins, the County Engineer, as to the meaning of the phrase 'substructure as per *addenda* for extras herewith'?"

On the ground that it was immaterial, that being a legal matter by which the county of Navajo could not be bound. Notwithstanding said objection the witness was permitted to testify as follows:

"A. Well, in order to save time, I will make my answer as brief as possible. The sum and substance of the discussion was that if there be any alterations—any additions to the original plan and bid that they should be paid for as provided by the proposal."

ASSIGNMENT OF ERROR NO. XXVII.

The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, on his direct examination by counsel for plaintiff:

> "Mr. STONEMAN.—Was there any question at that time expressed by Mr. Perkins—any claim by him that Mesmer & Rice were to construct this bridge with these changes suggested by him for the sum of $23,800.00?"

On the ground that it was leading and immaterial.

Notwithstanding said objection said witness was permitted to testify as follows:

> "A. I will say that the understanding was that whatever additional material was required to that called for in the original plan and bid would be paid for."

ASSIGNMENT OF ERROR NO. XXVIII.

The said United States District Court erred [182] in overruling defendant's objection to the following question asked of said witness, Popert, on his direct examination, by counsel for plaintiff:

> "Mr. STONEMAN.—Did Mr. Perkins say anything to you before the contract was signed as to whether or not he understood that the substructure commencing in the paragraph of Plaintiff's Exhibit 3, being the contract, where 'substructure' is used, *were* to be paid for at the unit prices, or were to be paid for as per

*addenda* for extras, or were to be paid for out of the flat sum of $23,800.00?"

On the ground that it called for a conclusion, that it was hearsay and immaterial. Notwithstanding said objection said witness was permitted to testify as follows:

"A. In a few words, the extra material as roughly described in contract for the substructure, extra material over that shown on the blue-print, 4183, should be paid for at the unit prices specified in the proposal. Well, I am trying to save my words and time as much as possible."

## ASSIGNMENT OF ERROR NO. XXIX.

The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, on his direct examination by counsel for plaintiff:

"Mr. STONEMAN.—Have you made a calculation, Mr. Popert, of the different items of materials used in the substructure for the purpose of showing the cost of the substructure based upon prices used in the contract, under the *addenda* clause. Have you made a calculation, yes or no?

A. Yes, I have.

Q. Will you read into the record the result of that calculation.

Mr. CLARK.—Are you asking (items) unpaid for to be read into the record?

Mr. STONEMAN.—Yes."

On the ground that it was immaterial and a matter to be determined by the Court itself.

Notwithstanding said objection the witness was permitted to testify at length as to the result of his calculations. [183]

ASSIGNMENT OF ERROR NO. XXX.

The said United States District Court erred in overruling defendant's objection to the following question propounded on the 20th day of March, 1924, to the witness, Popert, on redirect examination:

"Mr. STONEMAN.—Have you made a computation for the purpose of showing the cost of the material used in the construction of the bridge under the requirements of Mr. Perkins?

A. I have.

Q. Is it itemized as to the different character of material? A. It is.

Q. Will you please give me the results of your computation?"

On the ground that it was immaterial, as the matter was already settled by the contract, and because no demand was ever presented to the Board of Supervisors within six months from the furnishing of these items.

Notwithstanding this objection the witness was permitted to testify as to the items embraced in his computation, showing a total of $13,900.00.

ASSIGNMENT OF ERROR NO. XXXI.

The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, by counsel for plaintiff:

> "So that, until those supplemental plans and specifications had been approved by the Indian Department it was not possible was it, under the contract itself, to determine what either the extent of the changes, which in this case have been called extras, or the quantity or amount of the changes?
>
> A. No, it was not possible to determine that.
>
> Q. Now, did that consideration have anything to do with the wording of this clause of the contract as it was worded, that is, that all of the preliminary specification stated in the contract were to be paid for as per *addenda* for extras upon the proposal accepted?"

Upon the ground that it was immaterial and because that very phrase, the so-called *addenda* phrase, is in the bid and proposal of this plaintiff, made long before this contract, [184] or any part of it, was ever made.

ASSIGNMENT OF ERROR NO. XXXII

The said United States District Court erred in overruling the defendant's objection to the following question propounded by counsel for plaintiff to said witness Popert:

> "Q. That November claim appears to be divided into two parts, one part according to the interpretation of the contract placed upon it by the Board and the other part according to the interpretation placed upon the contract by Mr. Mesmer. Is that true and was that intended by you to be shown?
>
> Mr. CLARK.—Are you speaking of the demand of November 5?
>
> Mr. STONEMAN.—Yes, sir.
>
> Mr. CLARK.—Well, we object. It is immaterial.
>
> The COURT.—It speaks for itself?
>
> Mr. CLARK.—The demand shows upon its face just what it is." (Ex. 10, Tr. Rec. p. 197)

Notwithstanding said objection the witness was permitted to testify as follows:

> "That is correct—If you mean that the second paragraph should be in with the first paragraph in the contractor's interpretation—the two should be added together."

ASSIGNMENT OF ERROR NO. XRXIII

The said United States District Court erred in overruling defendant's objection to the following

question propounded by counsel for plaintiff to the witness Popert:

> "Mr. STONEMAN.—Did you hear at that meeting on December 3 any member of the Board of Supervisors offer to pay any additional money to the Merritt Extras and the sum of $6,204.00?"

Upon the ground that it was immaterial and that whoever made such statement offered it as a compromise that was unaccepted, proof of which would be inadmissible in any event.

Whereupon, counsel for plaintiff stated as follows:

> "Mr. STONEMAN.—It is not for that purpose. It is for the purpose of showing that it was the November demand which was in contemplation and being considered."

Notwithstanding said objection the witness was [185] permitted to testify as follows:

> "A. Your Honor, I can save time by saying, while I don't remember the exact name, I know that the Board felt as though they wanted to pay something—they wanted to do something to have the contractor satisfied and one of the members of the Board said that he would pay a thousand dollars extra and asked if that was satisfactory to Mr. Mesmer. Does that answer your question?"

ASSIGNMENT OF ERROR NO. XXXIV

The said United States District Court erred in sustaining the objection of plaintiff to the following question propounded by counsel for defendant to said witness Popert, upon cross-examination:

> Mr. CLARK.—Did you have anything to do, Mr. Popert, with preparing or assisting in the preparation of the original bill in equity that was filed in this court by Mr. Mesmer?
>
> (No answer.)
>
> I will put it a little differently. Q. Did you have anything to do with furnishing the information to Mr. Stoneman upon which that bill in equity was drawn? Did you consult with him as to any of the information used by him in making up that complaint at all?"

Upon the ground that it was irrelevant and immaterial. To which objection, upon suggestion of the Court, counsel for the plaintiff added that it was not proper cross-examination, unless it is an attempt to impeach the witness, in which event no proper foundation is laid. Thereupon, counsel for defendant read from paragraph 4 of said bill in equity as follows:

> "Complainant avers that under the terms of such contract he entered upon the construction of such bridge but that thereafter from time to time during the performance of the labor by complainant in the construction of said bridge, defendant, through its officers and

agents, proposed to require of complainant that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras as set forth in said proposal, contract and specifications."

Notwithstanding the reading of said paragraph 4, the ruling on said objection was adhered to. [186]

ASSIGNMENT OF ERROR NO. XXXV

The said United States District Court erred in overruling defendant's objection to the following question propounded to R. C. Creswell, a witness in behalf of the defendant, upon his cross-examination by counsel for plaintiff:

"Mr. STONEMAN.—Did you not know that when the bridge was finally constructed by Mr. Mesmer that it was not being constructed under the proposal and the plans and specifications originally submitted to him?"

Upon the ground that the contract at that time controlled and that the contract speaks for itself as to those matters.

Notwithstanding said objection the Court then propounded said witness the following question:

"The COURT.—Did you not know at the time this bridge was being constructed that it was not being constructed under the plans and specifications as made in the proposal of Mr. Mesmer before the contract was accepted? Before the award was made. Did you not know that the bridge was not being constructed in accordance with those plans?"

Notwithstanding the objection the witness was permitted to testify as follows:

"A. Well, there was some little heavier parts but, as I understood from the Engineer at that time, it did not amount to but very little."

ASSIGNMENT OF ERROR NO. XXXVI

The said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to said witness, R. C. Creswell, during the cross-examination:

"Mr. STONEMAN.—Didn't you know, Mr. Creswell, that Mr. Mesmer, in addition to the amount that he said that he would build this bridge for originally under his original proposal and specifications, would have to pay out more money for material if he built it under the specifications as recommended by Jordan—by Perkins, your county engineer?"

On the ground that that was assumed by the contractor in his contract. That it was immaterial

and a matter that was determined by the contract, which speaks for itself. [187] That it was an attempt to have this witness interpret the contract.

Notwithstanding said objection the witness was permitted to answer saying "No." That it was his understanding that they were to build a bridge for the contract price of $23,800.00.

ASSIGNMENT OF ERROR NO. XXXVII

That said United States District Court erred in denying defendant's motion for judgment filed herein and served upon counsel for plaintiff on the 21st day of May, 1924, as follows:

> "Comes now Navajo County, the defendant in the above-entitled action, and respectfully moves the Court for judgment in favor of the defendant for the following reasons:
>
> 1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plaintiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435 Revised Statutes of Arizona.
>
> 2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as required by the

laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings.

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called 'extras' which constitute the basis of plaintiff's claim, were with the exception of materials of the value of $1307.00 ordered after construction had commenced, specified and required to be furnished by plaintiff on the contract itself, under the contract price of $23,800.00.

6th. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agree-

ment with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge [188] and which were set forth in the contract, were to be *paid* for as 'extras.'

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction.

Defendant has filed on this date its trial brief upon the questions involved herein, and requests that said brief be deemed and taken to be a 'memorandum of points and authorities,' in support of this action.

Dated at Phoenix, Arizona, May 21st, 1924.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant."

Said motion was denied July 8, 1924 (Tr. Rec. 106) and by virtue of the judgment rendered herein on the 8th day of July, 1924, in favor of the plain-

tiff in the sum of $13,872.65 (Tr. Rec. 107), to which judgment and ruling, under and by virtue of its exception allowed, the defendant duly excepted.

ASSIGNMENT OF ERROR NO. XXXVIII

The said United States District Court erred in rendering judgment in favor of plaintiff and against the defendant, as aforesaid, for the sum of $13,872.65, on the 8th day of July, 1924, for all of the reasons and upon all the grounds set forth in the foregoing assignment of errors and defendant's motion for judgment.

WHEREFORE, by reason of the errors aforesaid, the defendant, Navajo County, prays that the judgment rendered and entered in this action be adjudged and decreed to be void; that the same be annulled and reversed, and that the said [189] District Court of the United States, District of Arizona, be directed to grant a new trial of this cause, or that this Court, because of said errors, cause a judgment to be entered in favor of the defendant.

THORWALD LARSON,
County Attorney.

E. S. CLARK,
NEIL C. CLARK,
Attorneys for Defendant. [190]

PLAINTIFF'S EXHIBIT No. 19.

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Ariz., May 7, 1917.

MESMER & RICE Presents this demand on the County of Navajo for the sum of SEVENTEEN THOUSAND EIGHT HUNDRED FIFTY-SIX and no/100 DOLLARS in payment of invoice of April 4th, for steel delivered, the items of which are heretofore annexed.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the following is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items hereunto annexed are true and correct in *very* point and particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

(Signed) MESMER & RICE.

Subscribed and sworn to before me this 7th day of May, 1917.

_____.

My commission expires:

66

STEEL FOR LITTLE COLORADO RIVER BRIDGE, NEAR WINSLOW, ARIZONA.

| | | | | |
|---|---|---|---|---|
| Trusses ..... | 103 | tons | | |
| Joists ..... | 74 | tons | | |
| Railings ..... | 7¼ | tons | | |
| Other steel ..... | 38¼ | tons | | |
| Cylinders ..... | 13¼ | tons | | |
| Total ..... | 186 | tons | @ 120 | |
| | | | | $22,320.00 |
| Less hold-back of 20% as per contract ..... | | | | 4,464.00 |
| Amount due. | | | | $17,856.00 |

Admitted and filed Mar. 18, 1924.

C. R. McFALL,
Clerk. [191]

## BRIEF AND ARGUMENT.

### THE CLAIMS OR DEMANDS FILED BY MESMER FOR "EXTRAS" AGAINST THE COUNTY, OCTOBER 1, AND NOVEMBER 5, 1917, WERE NOT VALID OR LEGAL CLAIMS AND WERE NOT SUFFICIENT TO GIVE THE BOARD JURISDICTION.

Under this head we group the following Assignments of Error:

VI. (Tr. Rec. 249-252-253.)

XXII. (Tr. Rec. 267.)

XXX. (Tr. Rec. 272) and

XXXVII. (Tr. Rec. 278.)

A County Board of Supervisors is not bound, nor has it the right to allow a claim against the county, unless all the items of the claim are given.

Paragraph 2434, R.S.A. 1913;

Christie v. Sonoma County, 60 Cal. 164;

Gardner v. Newayago Co., 110 Mich.; 67 N. W. 1091;

Cochise County v. Willcox, 14 Ariz. 234-236-237;

Yavapai County v. O'Neill, 3 Ariz. 363;

Santa Cruz County v. McKnight, 20 Ariz. 103;

Phillips v. County of Graham, 17 Ariz. 208-212-213;

Atchison County v. Tomlinson, 9 Kan. 167;

Ontagamie County v. Town of Greenville, 77 Wis. 165; 45 N. W. 1090;

Uzzell v. Lunney, 104 Pac. 945;

Allan v. Commissioners, 116 Pac. 175; 28 Okla. 773;

Chapman v. Wayne County, 27 W. Va. 496.

The case of Christie v. Sonoma County, 60 Cal. 164, turns on the construction of a statute almost exactly like Paragraph 2434, whch applies to claims of officers for everything except salary, as well as to claims of all others.

Since the above mentioned case was decided, California amended the statute in question by adding a paragraph to the effect that if the board do not hear or consider a claim because it is not itemized, they shall notify the claimant, and give him time to revise and reverify it. Arizona has no such statute.

County Government Act, California Statutes 1891, page 311;

Hennings General Laws of California, Volume 5, page 206, Sec. 40;

See also:

In re Pinney, 40 N. Y. S. 716;

In re White, 64 N. Y. S. 726; 51 App. Div. 175.

Brownsfield v. Houser, 49 Pac. 843.

## THE CLAIM FOR EXTRAS NECESSARILY CONSTITUTES AN ACCOUNT.

If the claim in dispute had been only for all or a part of the original contract price of $23,800.00, then it might be urged with some plausibility that no complete itemizaton was necessary.

Bayne v. Board, 95 N. W. 456.

But such contenton cannot be heard under the circumstances. Here the demand is for "extras," and for nothing else. The original contract price has admittedly been satisfied in full. Extras invariably consist of items, and items make up an "account." The demand of November 5th is characterizic by plaintiff in his verification as an "account." As was said in Old Second National Bank vs. Town of Middleton, 69 N. W. 471-72:

> "The distinction between the statute of South Dakota and ours is so manifest that no discussion is needed. Not only is ours prohibitory to the extent to which we have stated, but section 690 thereof provides that any member of such auditing board who shall audit and allow any account, claim or demand so required to be itemized and verified without the same being first duly itemized and verified shall be deemed guilty of a misdemeanor, and be punished by a fine not exceeding $500.00, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. The severity of this penalty indicates how important the legislature deemed the itemizing and verifying to be. The items of an account would the more readily enable the board to detect fraud or mistake, and the verification would subject the claimant to prosecution in case of perjury. These requisites, therefore, constitute material

safeguards in behalf of the town against fraudulent or unjust claims."

It is treated as an account in the amended complaint throughout.

To be intellgently or understandingly presented under the "addenda" clause, it would have to take the form of an account. If it be suggested that the board knew, or should have known, that extras were required and what they would cost, we say it was not the duty of the Board, at least in advance of an itemized bill, to determine what extras had gone into the bridge and what they came to. Secondly, under the construction the Board placed on the contract, they had nothing to do with extras. Such a suggestion would amount to a complaint that the Board did not make out plaintiff's claim for him. If plaintiff did not himself consider this claim on "account" and our statutes make no distinction between a "claim" and an "account," why did he file a purported itemized account with the Board on May 23rd, 1918? Why does he undertake to itemize those "extras" in his amended complaint? And why did he itemize those extras that he has been paid for in his demand of December 3, 1917? Why did he and his witness testify to the cost of these extras, item by item? (Tr. Rec. 262-271.) And if this is not an account, then plaintiff is not in court, as, if not an account, he would have no right under Paragraph 2439 to

accept what was allowed him and sue for the balance claimed. We copy Par. 2439:

"2439. A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after final action of the board, but not afterward, and if in such action judgment is recovered for more than the board allowed, on presentation of the judgment the board must allow and pay the same, together with the costs adjudged, but if no more is recovered than by the board allowed, the board must pay the claimant no more than was originally allowed. A claimant dissatisfied with the amount allowed him on his account may accept the amount allowed, and sue for the balance of his claim, and such suit shall not be barred by the acceptance of the amount allowed."

Our research has failed to disclose a single case where extras were treated as otherwise than as items of "account". The very term imports that, and all the circumstances of this case show that anything in the way of extras was severable from the main contract, and of course, was to be listed and presented as other claims. Indeed, were the suggestion that this claim is not an account sound, there would never be any need for itemizing, it being possible in all cases for the board to find out what material had been furnished or service rendered.

THIS REQUIREMENT BEING JURISDICTIONAL, IT CANNOT BE WAIVED.

Paragraph 2434, R. S. A., 1913,

Cochise County v. Willcox, 14 Ariz. 234, at p. 237,

Santa Cruz County v. McKnight, 20 Ariz. 103, at pages 112-113.

In Cochise County v. Willcox, *supra*, (pp 237-40) the court said:

"The board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within six months after the last item of the account accrued, except as provided in Section 62 of this chapter... It follows necessarily that, if the board "must not hear or consider" a demand presented after the period of six months has passed, it has jurisdiction to make no order other than one of rejection or disallowance. In construing a similar statute, the Supreme Court of California said: "Section 40 of the County Government act of 1897 (Stats. 1897, p 470) provides that the Board of Supervisors must not allow any claim in favor of any person against the county unless upon a properly itemized and verified claim 'presented and filed with the Clerk of the Board within a year after the last item of the account or claim is accrued'. The claim of

plaintiff was filed and presented more than a year after it accrued and hence the Board not only had no power, but was expressly prohibited from allowing it. It had no power to dispense with the express mandates of the statute. Citing:

Perrin v. Honeycutt,
144 Cal. 87, 77 Pac. 776,
Murphy v. Bondshu,
2 Cal. App. 249, 83 Pac. 278,
Carroll v. Siebenthaler,
37 Cal. 196,
Thoda v. Alameda County,
52 Cal. 350

"If, therefore, the board cannot even "hear or consider" a demand not presented within the prescribed period, the limitation in Section 989 (Now 2434) is more than a "law of limitation to be made available only when specially pleaded"; it affects not only the remedy, but goes to the very right of the plaintiff to maintain any action whatever."

Clearly the Board has no jurisdiction over a claim unless itemized, and, not having jurisdiction, it can take no favorable action; much less waive the jurisdictional requirement. A Board of Supervisors is of inferior and limited jurisdiction, and nothing is presumed in support of its jurisdiction.

The defense that no itemized statement was filed by plaintiff is expressly pleaded in the substitute paragraphs filed by defendant in answer to sub-

stituted paragraphs filed by plaintiff. (Tr. Rec. 96-97-98)

But even if not pleaded at all, it is not thereby waived.

Cochise County v. Willcox,
14 Ariz. 234, and cases cited, at page 240.

If a claim not properly itemized and verified should be allowed, the allowance is void, and subject to collateral attack.

State v. Goodwin (S. C.)
59 S. E. 35

We present these authorities because the trial court held, in effect, that the Board had waived the statutory provisions here being discussed. (Tr. Rec. 167)

## THE SO-CALLED DEMAND OF OCTOBER 1st, 1917, WAS FINALLY DISPOSED OF ON NOVEMBER 5th and THIS DISPOSITION BARS PLAINTIFF'S CLAIM.

All of the substructural work was completed and in place prior to October 1st, 1917, or certainly payment therefor would not have been demanded on that date. Everything designated as extras by plaintiff had accrued and was incorporated in the claim and demand of plaintiff on that date. This demand, in so far as it embraces extras, is for $13,250 (Tr. Rec. 196). The Board considered this claim on October 1st, and its only action at that time was to refer it to the county Engineer for

his report. The claim again came up for consideration November 5th, at which time it was finally rejected. (Tr. Rec. 252) The claim of October 1st for all extras in the substructure,—was therefore twice considered by the Board, and wholly and finally rejected on November 5th, 1917. There is no escape from the completeness and effect of the rejection. The cause of action of plaintiff, if he had any, then and there accrued—for all extras included in the October demand, and of course these are the same extras sought to be included *pro tanto* in the demand of November 5.

Under Paragraph 2435, Revised Statutes of Arizona, 1913, it was within the power of the Board to postpone action on the claim of October 1st, 1917, to November 5th. Under the same paragraph, the Board is required to act on all claims filed one day previous to the regular Board meeting, or for good cause, (which must appear of record), postpone the same to a future meeting. The Board, by statute, is given the power to postpone its action on a claim, *but it does not* have the power or authority to reconsider a claim that has been wholly rejected.

Paragraph 2438, Revised Statutes of Arizona.

We copy the two last-mentioned paragraphs:

"2435. No account shall be passed upon by the board unless made out as prescribed in the preceding section, and filed by the clerk at least one day prior to the session at which it is asked to be

heard. All accounts so filed shall be considered and passed upon at the next regular session, after the same are presented, unless for good cause the board shall postpone the same to a future meeting.

"2438. When the board finds that any claim presented is not payable by the county, or is not a proper county charge, it must be rejected; if they find it to be a proper county charge, but greater in amount than is justly due, the board may allow the claim in part and draw a warrant for the portion allowed, on the claimant filing his receipt in full for his account. If the claimant is unwilling to receive such amount in full payment, the claim may again be considered at the next regular succeeding session of the board, but not afterwards.

## THE DEMAND OF NOVEMBER 5, 1917, IS VIRTUALLY A REPETITION OF THE OCTOBER DEMAND.

This brings us now to a consideration of the demand of November 5th. Like that of October 1, it does not even attempt ot itemize the extras. Except for the work on the superstructure, for which on extras were chargeable or claimed. (Tr. Rec. 257-271) this demand is a repetition of the demand of October 1st. It is for exactly $2750.00 more than the October demand, so far as extras are included. The demand on its face shows that it was considered by the Board of Supervisors on November 5th, and was rejected. Any contention

that action on the demand of November 5th was postponed is hopelessly at variance with the positive records, which show that it was rejected on November 5th. Even if there could legally have been a reconsideration, it could only affect that portion of the claim which pertained to work done after the October demand was filed. The demand for extras in the substructure was filed on October 1st, and rejected November 5th. The cause of action then would have had the claim been valid, and once having accrued, the statute would have commenced to run against it. On May 5, 1918, the cause of action ceased to exist, and would have been if the demands had been valid, which certainly they were not.

Coming now to the meeting of December 3rd. Not only is the record positive, but the evidence of the witnesses is most convincing, that the Board of Supervisors consistently and unalterably refused to reconsider its action on the particular demand filed on November 5th. Mr. Mesmer himself so testifies. (Tr. Rec. 157) Its action, on November 5th, rejecting the demands of that date and of October 1, was never set aside, and the Board had no power or authority to reconsider at a subsequent session, a demand that had previously been wholly rejected. The Board on December 3rd did not reaffirm its action on November, nor did it attempt to vacate or set aside its rejection of November 5th. It simply refused to recede from the positive stand

it had taken, and in that respect its attitude was no different on May 23, 1918, and is not today. All it did on December 3rd, was to allow a separate, independent and final demand of plaintiff's for $6204. It emphatically did not consider or reconsider any other. If the insignificant extras paid for on that date were included in the demand of November 5th, there is nothing to show that the Board knew it. Nothing is itemized in that demand. And even if they had known it, that fact could not have conferred jurisdiition on the Board to reconsider an illegal and extinct demand.

## NO CLAIM FOR EXTRAS OF ANY KIND WAS EVER ALLOWED UNTIL THE FINAL PAYMENT ON DECEMBER 3rd, 1917.

Every dollar paid to plaintiff down to December 3rd, 1917, was a payment on the contract price of $23,800, and not a dollar was allowed on extras until that date. (Tr. Rec. 165). Indeed, the very language of plaintiff's demand of December 3rd, proves that, even if there were no other evidence. The language is "*for balance due to complete the amount of $23,800.00*, on the contract of Winslow-Colorado River Bridge, together with extras herein listed." Credit for $17,600 is given, which is every dollar that had been paid, including the $4976.00, allowed on November 5th.

It is signifciant that in the demand of November 5th, the total charge on the contract price is $17,600.

A total credit is given of $12,624. Add to this the partial payment of $4976 made on that day, and it gives exactly $17,600, the amount claimed by plaintiff to be then due on the contract price, and the exact amount credited by plaintiff on the contract price in the demand of December 3. It therefore stands established and undisputed that the only extras the board ever allowed, were those allowed on December 3rd. Every allowance prior to December 3rd, was made by the Board and accepted by the plaintiff as part payment on the contract price of $23,800.00, and not otherwise. In fact, there was never any valid or legal claim for extras of any kind or character until December 3rd. The claims of October 1st and November 5th, in so far as they purport to cover extras, were not claims at all, in a legal sense. Neither of them was sufficient, not being itemized, to give the board jurisdiction.

The demand dated November 5th was rejected November 5th, as the demand itself shows, and as a member of the Board testified. (Tr. Rec. 248) Such being the fact, any further consideration of the claim on December 3rd necessarily had to be pursuant to Paragraph 2438, and the only other statute providing for the reconsideration of claims. The claim was not open to reconsideration under the provisions of Paragraph 2438, *supra*, and the final rejection of his claim upon which this action is based therefore accrued November 5th. This is

the only possible conclusion to be drawn from the proof, and the laws of this state make it impossible for it to have been otherwise.

Facing the facts fairly, and with due consideration of the laws of the State, it is indisputable that the demand of October 1st was a claim for practically all, if not all, the alleged extras on the substructure of the bridge, and that the claim or demand was considered by the Board October 1st, and action deferred thereon to November 5th, when it was positively rejected. After this rejection, the board had no authority to further consider the claim for extras included in that demand. There is a limited period within which the Board of Supervisors may consider demands filed, and once having reached that legal limit, the authority of the Board over them ceases. The intention of the Legislature was that the Supervisors should act definitely and finally within a prescribed period. When action is finally taken, it is conclusive on all parties, including the Board of Supervisors. It avails the claimant nothing to file a new demand later for the same debt. The law has interposed a bar to further consideration of such a claim. Subsequent demands for a rejected claim do not and cannot interrupt the running of the statute.

Regardless of the multiplicity of demands filed by plaintiff, the statute commenced to run against his claim for so-called extras in the substructure, when the demand of October 1st for such extras

was rejected once and for all on November 5th. The demand of November 5th, covering the same matter was rejected the same day, but such rejection did not add to or take away from the already rejected claim.

Ignoring for the moment the statutes of Arizona prescribing the manner in which claims shall be presented and acted upon by the Board, and assuming that, contrary to these provisions, the Board has the power to approve a claim at one meeting and reject it at the next, and vice versa, and disregarding entirely the claim and demand of October 1st, which, of course, is impossible, and assuming that on December 3rd, the Board attempted to reconsider its rejection of November 5th of the November demand, and as contended by plaintiff, did then allow the November 5th demand in part and reject it in part, then the action of the Board is governed, and the plaintiff is bound, by Paragraph 2438.

UNDER PRARGRAPH 2438, ONLY CLAIMS THAT HAVE BEEN PARTIALLY ALLOWED CAN BE CONSIDERED T THE NEXT MEETING OF THE BORD. CLAIMS WHOLLY REJECTED CANNOT BE RECONSIDERED.

This paragraph distinctly provides that the only claim that can be reconsidered at the next regular meeting after being once considered, are those which have been partially allowed. It is only in

cases where a claimant is unwilling to receive the amount allowed in full payment that the claim can be again considered at the next meeting. An order wholly rejecting a claim becomes final when made, and suit must be brought on it within six months, if at all. The demand of November 5th was rejected on that date. Nothing was allowed on it then or ever afterward. It is true that an allowance of $4976.00 was made on the $23,800.00 contract price, but that was not and is not the demand in dispute. The demand here is wholly and exclusively for extras. The rejected demands of October 1st and November 5th were for extras, and for nothing else. Both of these demands severed the claim for the contract price from the claim for extras, leaving each separate and distinct. The allowance, in all cases, prior to December 3rd, were upon the contract price, and the rejections, which were always complete, were rejections of the demands for extras.

## THE ACTION IS BARRED BP LIMITATION.

The demand of October 1, having been finally rejected at the next regular meeting on November 5, and this action not having been filed within six months from that date, the action is barred. (Assignment XXXVII, Tr. Rec. 279).

The plaintiff, in contending that the demand of November 5th was not finally rejected until December 3rd, overlooks the statutory restriction

above discussed, and seems to forget that even under his theory of the case, the November demand, as it stood on December 3rd, could only consist of the difference between the amount claimed for extras as therein, and the corresponding claim in the October demand, or $2750.00. That is to say, even on plaintiff's theory, the October claim could not be considered except at the November meeting, and having been finally rejected in November, the amount of it for extras could not, of course, be again considered in December. Viewing the case, then, from plaintiff's angle, the only claim over which the Board could have retained any jurisdiction on December 3rd, (not admitting that it ever had jurisdiction at all) was that portion of the demand for extras of November 5th, not included in the demand of October 1st, or $2750.00. Having lost jurisdiction over the amount included in the demand of October 1st, for extras, it is, of course, elementary that the Board could not regain jurisdiction through the plaintiff's futile expedient of filing a new demand on November 5th for the same matters that had already been rejected. The fact that the November demand was for a larger sum for extras than the October demand, does not affect the rejection of the October demand, as it is admitted that the November demand covered everything claimed for extras, including, of course, everything claimed therefor in the October demand.

## PLAINTIFF HAS BEEN FULLY PAID AND HAS EXECUTED RECEIPTS AND RELEASES EFFECTING A DISCHARGE.

The receipt and release executed by plaintiff was intended, as it actually purports to be, a full and complete satisfaction of every claim and demand that plaintiff, or any one acting under him, might have or claim against Navajo County.

If any question could possibly be raised as to the completeness of this as a discharge, then let us refer to the undertaking of indemnity filed by plaintiff on December 3rd, 1917. (Dfts. Exhibit "B")

By this agreement of indemnity, (Tr. Rec. 156-161, testimony of Mesmer) the plaintiff not only fails to claim or even hint at anything being further due either for extras or otherwise, but expressly binds himself, in case a claim is made, to protect the County against it. This is a sweeping engagement, and includes all claims, including, of course, one by himself, as there is no exception. If plaintiff honestly considered that he had not been paid in full, why should he indemnify the County? If the County owed him $15,000.00, after paying him $6204.00, on December 3rd, could it have reasonably asked him for his own indemnity guaranty? The indemnity proves that both parties considered the settlement final, and this is clinched by the fact that the whole matter rested, as settled and final, for more than five months thereafter,

without a word so far as the record shows, until, seemingly as an afterthought, plaintiff appears with what he calls and claims to be an itemized demand on May 23rd, 1918.

The money that was paid to plaintiff on December 3rd, was on a demand made and filed on that day. It was separate and distinct from the demand of November 5th. It purported to be a final demand. It was paid in full and certainly constituted a distinct and irrevocable waiver of all prior demands. Taken in connection with the undertaking filed on December 3rd, it is clear that the acceptance of full payment of that demand was intended as a full settlement, and as a waiver of all other demands.

Phillips vs. County of Graham, 17 Arizona 213. In this case the court said:

> "Their demands were unliquidated, and the duty of investigation into the claims to determine if the services charged against the county were actually rendered or not was necessary under the law. In the performance of this duty the Board acted in a quasi-judicial manner, and the allowance, when accepted by the claimant, was in complete satisfaction of the claim. . . .
>
> Where a claim is unliquidated or in dispute, payment and acceptance of a less amount than claimed, is satisfaction, operates as an accord

and satisfaction, in the absence of fraud, artifice, mistake or imposition."

In Santa Cruz County vs. McKnight, 20 Ariz. 112, the Court said:

> "The facts are not as though the officer had presented a demand for what he now claims as his legal salary and the board had allowed him less than his demand. . . It is a case of mutual mistake, where less is claimed than the law allowed, and where less is paid than the law allowed."
>
> " . . . *If the demand had consisted of many items subject to inquiry and investigation; if it had been unliquidated or disputed in whole or in part— a different question would be presented; that it a question of estoppel*"
>
> "Paragraph 2434, supra, provides that claims against the county must be presented to the board of supervisors within six months after the last item accrues, stating minutely what the claim is for, and specifying each several item and the date and amount thereof, all duly verified, and forbids the board from considering a claim not so made and verified, and not presented within six months after the accrual of the last item thereof".

It may be urged that under Paragraph 2439, Revised Statutes of Arizona, 1913, "a claimant dissatisfied with the amount allowed him on his account may accept the amount allowed, and sue for

the balance of his claim, and such suit shall not be barred by the acceptance of the amount allowed." That is, if the claimant is dissatisfied with the amount allowed he may sue. But if he be satisfied; if he executes such release or discharge as manifests satisfaction, as the plaintiff did, he certainly loses his right to sue. The plaintiff is precluded by his conduct, his releases and his long acquiescence from now saying that he was "dissatisfied" and therefore retains his right to sue.

Chicago M. & St. P. Ry. Co. vs. Clark,
20 Sup. Ct. Rep. 924;
44 L. Ed. 1099;

Sines vs. Three States Lumber Co.
135 Fed. 1019;

Harrison vs. Henderson,
72 Pac. 875;

Where a creditor accepts a check tendered as payment in full, and retains the proceeds, there is an accord and satisfaction, notwithstanding his protest that he does not accept it in full.

Neely vs. Thompson,
75 Pac. 117;

McCormick vs. City of St. Louis,
65 S. W. 1038;

THE DEMAND OF MAY 23, 1918, IS OF NO EFFECT BECAUSE FILED TOO LATE AND BECAUSE IT DOES NOT MEET THE STATUTORY REQUIREMENTS.

Under this head we group the following Assignments of Error:

VIII (Tr. Rec. 254).

XXXVII (Tr. Rec. 279).

Not conceding, but for the sake of argument only, that the demand of May 23rd, 1918, (Tr. Rec. 206) meets the statutory requirements, then under Paragraph 2434, it was filed more than six months after the last item accrued, which was before November 5, 1917, according to the testimony of Mesmer himself, who said the extra work was completed before that month. (Tr. Rec. 150-151-157-159) The whole controversy is limited to the changes in the substructure. No one claims that this was not completed before November. It is clear that no legal demand was filed within six months.

These circumstances also show conclusively that no suit was filed within six months after the final rejection of the demand on November 5th. Suit was not filed until May 31st, 1918. The claim itself is barred because no itemized account was filed within six months after the last item accrued, and the action is barred because not filed within six months after final rejection of the claim. It makes no difference whether the demand of November 5

was finally rejected then or on December 3, as it never afforded the Board jurisdiction.

## THE BOARD OF SUPERVISORS WILL NOT BE DEEMED TO HAVE INTENDED TO DO MORE THAN THE LAW ALLOWED THEM TO DO.

(Assignment XXXVII, Tr. Rec. 280)

The court admitted, over the objection, evidence of conversations between the parties and their representatives prior to the date of the contract, on the theory that it tended to show the intention of the parties. It was then, and is now, our view that this was immaterial in so far as the intention of the Supervisors was concerned. That is, their intentions, as officers of the county, must be presumed to extend only to the things the law permits them to do. It is familiar rule that the law relating them to do. It is a familiar rule that the law relating to a contract is a part of the contract itself.

> "The law of the place where the contract is entered into at the time of the making of the same is as much a part of the contract as though it were expressed or referred to therein".
>
> 13 C. J. 560, Par (523)—3.
>
> "Statutes in force at the time a contract is made by a municipality enters into and become a part of a contract. Its obligation is to be measured and performance is to be regu-

lated by the terms and rules which they prescribe."

Cincinnati vs. Public Utility Commission,
3 A. L. R. 705, 98 State, 320;
121 N. E. 688; See also 6 R. C. L. 325.

"Agreements in violation of positive law are those which are expressly or impliedly prohibited either by some rule of the common law or by some express statutory provision."

13 C. J. 411-(341-2)

The plaintiff was bound to inform himself, and from the foregoing, it is fairly reasonable to suppose that he had informed himself as to the power or lack of power of the Board of Supervisors, after having accepted a bid for a particular type of bridge, to increase the expenditure for said bridge to an amount more than $15,000.00, in excess of the amount available therefor under the bond issue, to-wit; $28,500.00, without competitive bidding. It was the duty of the contractor to inform himself that the statutes of Arizona provide, among other things, that the Board of Supervisors may not purchase materials in excess of $100.00 valuation without advertisement and competitive bidding; that he inform himself of the provisions of Paragraph 2431 of the Civil code of Arizona to this effect:

"The Board must not for any purpose contract debts or liabilities except in pursuance of law or

ordinances of its own adopting, in accordance with the powers herein conferred".

"The power of such a board to bind the city depends on express grant, and a person dealing with it is bound to take notice of the limits of its authority."

28 Cyc. 1024, notes 41-42.

"No judgment can be rendered upon an account based upon an obligation prohibited by the Harrison Act".

McRae vs. County of Cochise,
5 Ariz. 26.

"A contractor dealing with a municipal corporation is chargeable with knowledge of the limitations on the power of its agents and officers."

Contra Costs Construction Company vs. Daly City, 192 Pac. 178

"A person contracting with public officers must take notice of their powers and is charged with a knowledge of the law, and makes a contract in violation of the law at his own risk, and where public officers fail to advertise and contract with the lowest bidder, a contract so made is wholly void and imposes no obligation upon the public body."

Reese vs. Ultra Vires, Paragraph 190

"The plaintiff is chargeable with knowledge that the Fire Commissioners in employing him,

had no authority to bind the defendant, and the City cannot be held liable for the services rendered even if beneficial to it".

Douglas vs. Lowell, 194 Mass. 268; 80 N. E. 510;

Higginson vs. Fall River, 226 Mass. 423; 115 N. E. 764; 2 A. L. R. 1211;

## THE PLAINTIFF COULD NOT ALTER HIS BID AFTER THE CONTRACT WAS AWARDED.

In the case of City of Chicago vs. Mohr, the contractor Mohr, was permitted to alter his bid, such bid having been submitted after due advertisement and submission of bids in competition with other bidders. The Supreme Court of Illinois said:

"It is a clear violation of the law to permit the change in the bid of the Freeman Company as to the matter of time. That it is obvious to allow the change of the bid in any material respect after the bids are opened is a clear violation of the purpose, intent and spirit of the law, and opens the door for preferences and favoritism as between the different bidders, if not to the grossest frauds. When a bid is permitted to be changed it is no longer the sealed bid submitted in the first instance, and to say the least is favoritism if not a fraud, a direct violation of the law and cannot be too strongly condemned".

216 I.. 320; 74 N. E. 1056.

And upon this point that court cites the following in support of its position:

State vs. Board of Commissioners, 11 Neb. 484; 9 N. W. 691;

Beaver vs. Trustees, 190 Ohio State 97;

Boren vs. Commissioners, 21 Ohio State, 311

The attention of the court is also invited to the case of Fairbanks Morse & Co. vs. City of North Bend, 94 N. W. 537. In this case, a bid was submitted by Fairbanks Morse & Co. and along with other bids, for furnishing certain machinery. Thereafter, and within a day or two, the same company submitted a new bid by which they modified their bid so as to furnish different machinery, but for the same amount of money. Upon the situation thus presented, the court said:

> "It will be conceded, we think that a valid contract of the character mentioned can be made by the City only after it has advertised for bids, and then only with some person in accordance with the bids tendered by him in response to such advertisement".
>
> Citing numerous cases in support of this principle.

In the case of Ely vs. Grand Rapids, 44 N. W. 447, a change in the contract was attempted by the

City Council of Grand Rapids after having entered into a contract with one Ely for the construction of a certain amount of paving, by permitting the contractor Ely to perform an additional amount of paving at the same rate as the original contract. Of this the court said:

> "It is true that the paving of gutters was within the scope of improvement, but this didn't confer upon the defendant the right to dispense with the charter requirements for competitive bids."
>
> Citing McBrien vs. Grand Rapids, 56 Mich. 95; 22 N. W. 206.

In Clinton Construction Company of California vs. Clay, 34 Cal. App. 525; 168 Pac. 588, the court held:

> "A Board of Education cannot contract for work not provided for under original contract exceeding $500.00, without complying with section 130, requiring letting contracts to lowest bidder after public notice".

Indeed the plaintiff himself did not think he could lawfully vary his bid. (Tr. Rec. 170—testimony of W. H. Popert.)

In L. R. A. (N. S.) vol. 38, p. 660, note 8, is the following:

> "Generally public officers have no authority to make or allow material or substantial changes in any of the terms of the proposed contract after the bids are in. Such a course

would prevent real competition and lead to favoritism and fraud".

Citing numerous cases.

"The specifications cannot lawfully be altered after the bids have been made without a new advertisement giving all bidders an opportunity to bid under the new conditions. The municipal authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited".

19 R. C. L.—Par. 357.

"Where public interests are affected by a contract, the construction placed upon it by the parties is not controlling".

13 C. J. 550-note 72.

This, it would seem is especially true where the contract is severable—that is, one part upon a contract to build a bridge of certain specifications for a definite price, and a claim is made, as in this case, for a different and heavier bridge, the excess sought to be recovered separately as "extras".

13 C. J. 563.

And in such case, where the general public is affected by a violation of a particular statute, or the provisions of any public law, it is not necessarily essential to plead the illegality of a contract constituting such a violation.

Dunham vs. Hastings Pavement Co.,
67 N. Y. S. 632;
Kearns vs. New York, etc., Ferry Co.,
42 N. Y. S. 771;
Dealey vs. San Mateo Land Co.,
130 Pac. 1066-68;
Vol. 19 R. C. L. Par. 352 has the following:

"When a contract is entered into in violation of a positive rule of law intended for the protection of the taxpayers, such as a requirement that contracts of a certain character shall be given to the lowest bidder, or that the incurrence of an obligation of a certain magnitude shall have the approval of the voters of the municipality, there can be no recovery either upon the contract itself or upon a quantum meruit".

It appears from the record that the bridge in question was built with the proceeds of bonds issued and sold by the county of Navajo for the purpose of building this bridge and other bridges. (Tr. Rec. 68-71-283-290) It is in evidence and not disputed that the amount allotted for the building of this bridge T—3, was about $28,600.00. (Tr. Rec. 144) and that this was the amount of county money the electors of Navajo County authorized the Supervisors to expend upon it in the election proceedings.

There was no statutory authority for the Board after awarding a contract upon competitive bid-

ding for the building of a bridge at a stated price, to then contract for different construction of the same bridge without competitive bidding, under the guise of "extras", more particularly when the supposed "extras" amount to the unparalled proportion of nearly three-fourths of the original contract price. If it should be established in this case that the Board could make so improvident an arrangement, a dangerous power would be placed in its hands. If a Board can do what plaintiff seeks to enforce upon it in this case, it can let a contract for a $10,000.00 bridge, and then, under the subterfuge of "extras", make the same bridge cost $100,000.00.

There were, moreover, many statutory provisions in force in Arizona in 1916, which denied, expressly or impliedly, any such power. Boards of Supervisors exercise inferior and limited jurisdiction. They can do only those things which by express provision or necessary implication, they are permitted to do.

Hammer vs. Smith,
11 Ariz. 420.

County of Santa Cruz vs. Barnes,
9 Ariz. 42.

The Board of Supervisors of a county may make certain contracts for the county, but the county is the contracting party, and the Board is the mere agency through which the county acts.

Gannon vs. Hohnsen,

14 Ariz. 523.

Paragraph 2421 Revised Statutes, 1913, page 850, reads as follows:

> "All books, stationery and supplies for county institutions for the ensuing year, and all erections of, repairs to and alterations in any county building exceeding in value the sum of One Hundred Dollars, shall be let by contract, after advertisement made for bids therefor for not less than ten days nor more than four weeks in the official paper of the county. Such advertisements shall state that sealed bids will be received at the office of the board of supervisors until a date therein named, and shall state generally the nature of the bids, and that specifications therefor may be seen at the office of said board, or, it may call for specifications and bids. The board shall let the contract to the lowest bidder, or may reject all bids and readvertise".

It may be urged that this provision does not apply to bridges. We think, however, that the paragraph is intended as a general declaration of policy, and that it was intended to apply to any structure the county might build, in which the value exceeded one hundred dollars. This view is fortified by Paragraph 5124, which reads as follows:

> "Upon the adoption by the board of control or the board of supervisors, under whose direction the work is to be done, of the plans and

specifications for the construction of any state highway or bridge, or extensions thereof, it shall be optional with the board of control or board of supervisors, as the case may be, to have any or all work provided for by this act done either by contract or under a wage system. In case the work is to be done by contract, it shall be the duty of the said board of control, or board of supervisors, to advertise in a newspaper published in such county, where the proposed work is located, for sealed proposals for the doing of such work. Such notice shall be given for at least thirty days prior to the opening of such sealed proposals, which shall be directed to the said board of control, or the board of supervisors, as the case may be, and marked "State Highway Contract". Upon the opening of such proposals, the contract for the work shall be let to the lowest responsible bidder, provided, however, that the said board of control, or board of supervisors, shall have the right to reject any or all bids and may proceed to construct said work under their own supervision, without contract. In case the contract is awarded, as herein provided, the successful bidder shall enter into such a contract with the State of Arizona, or the county in which the work is to be done, as may be prescribed by the said board of control or the board of supervisors, a copy of which contract

shall accompany the plans and specifications. The successful bidder shall also file with the said board of control or the board of supervisors, a good and sufficient bond, payable to the State of Arizona, or to the county, in a sum not less than twenty-five per cent of the contract price of said work, conditioned upon the faithful performance of said contract."

Where bonds are issued, as is the case here, the board can only proceed as provided by Paragraph 5282:

"If any bonds or other evidences of indebtedness shall be issued and sold by any county, school district, city, town, or other municipal corporation, under the provisions of this chapter, for the purpose of erecting and furnishing any public building within such county, school district, city, town or other municipal corporation, the board of supervisors, in event such public building shall be erected and furnished by the county or school district, and the city or town council in the event such public building is to be erected and furnished by a city, town or other municipal corporation, shall, within the period which it is required under the provisions of the preceding section of this chapter prepare and adopt a form of bond or other evidences of indebtedness, adopt plans and specifications for such building, and said board of supervisors, city or town council, as the case

may be, shall, as soon as may be practicable after the adoption of such plans and specifications, advertise for bids for the erection and furnishing of said buildings."

"The notice of advertisement for such bids shall set a day and hour, not less than forty days from the date of such notice, when said bids shall be received and opened, and said board of supervisors; city or town council, as the case may be, shall award the contract for the erection and furnishing or the erection or furnishing of said building to the lowest and best responsible bidder, provided that any and all bids so submitted may be rejected. In the event any bid shall be accepted, said board of supervisors, city or town council, as the case may be, shall require the person or persons to whom such award or contract has been let, to enter into a written contract with said board of supervisors, city or town council, as the case may be, for the erection and completion of said building and the furnishing thereof, and shall require such person or persons entering into such contract to give bonds to said county, city or town, for the amount of the contract, with two or more sufficient sureties, or give a surety company bond in a like manner, conditioned upon the faithful performance of the contract, such bond to be approved by the board

of supervisors, city or town council, as the case may be.

While this paragraph does not expressly apply to bridges, it is made to do so by the proviso in Paragraph 5285, which is a part of the same chapter as Paragraph 5282.

If it be claimed that the county ratified the alleged agreement, then the authorities are practically universal that the board of supervisors could not ratify a contract which they had no right in the first instance to make. This is a corrollary to the general proposition set forth above.

Such a contract cannot be ratified. 19 R. C. L. Paragraph 360 reads in part as follows:

> "It is clear that the attempted ratification by a municipal corporation of a contract which it has no power to enter into is ineffectual, and cannot render the contract a binding obligation."

In addition to the presumption that the supervisors could not have intended to do that which exceeded their authority, we have their positive testimony (Tr. Rec. 157-165-175-187) that no such intention existed, and no such agreement was ever considered. In the light of these circumstances, the construction claimed by plaintiff cannot be sustained.

THE SPECIFICATIONS AS TO SUBSTRUCTURE IN THE CONTRACT AMOUNT MERELY TO A DESCRIPTION OF THE SUBSTRUCTURE AS FINALLY AGREED UPON, AND THE WORDS "AS PER ADDENDA FOR EXTRAS UPON THE PROPOSAL ACCEPTED" REFER ONLY TO CHANGES ORDERED BY THE INDIAN OFFICE OF OTHERWISE, AFTER CONSTRUCTION HAD COMMENCED.

This is raised in Assignments XII and XIII.

It is so obvious that this is true that argument seems unnecessary. The very language signifies this, and nothing more. Reference is made to the addenda clause, and the plaintiff relies upon it. That being so, he must accept all of it, or none. He may not select that part of it which is advantageous to him, and reject that part of it which is advantageous to the defendant. Plaintiff would have the court ignore the opening sentence of the addenda clause "If, *after construction has commenced*, it becomes apparent that additional quantities are required, etc., and consider only the prices at which the extras were to be furnished. The unfairness of this is plain. There is not a word in the entire contract that to our minds even implies that any part of the structure as described in the contract was to be paid for on the basis of extras. It is hardly conceivable that the supervisors entertained such an idea, or that they would have

signed the contract if they had. If the plaintiff had ever told them—of which there is not a word of evidence—that he would charge the county about $15,000.00 for the change in the substructure, is it reasonable to think they would have entertained it for a moment? They certainly would not—they would have called for new bids. If, indeed, plaintiff had ever been fair enough to tell the board what he designed to charge for this change in the substructure at any time between September, 1916, and when he commenced work, he would not have been permitted to start. He says he told the County Engineer. (Tr. Rec. 260) That is not enough. The plaintiff testified that early in August, 1916, he had not only made a revised plan of the bridge for his own information, but had figured out the extra material required, and he did not even submit this plan to the Board. (Tr. Rec. 261) Fairness would demand that the board should have been informed in some way that the contractor not only intended to charge additionally for the change in the substructure, but that he intended to charge for it on the exorbitant addenda basis. The State Engineer so states (Tr. Rec. 203) They were not so informed. If the board entertained the intent to tolerate a wrong so gross as this, they would have been guilty of a fraud upon the county they represented in a fiduciary capacity. It is incredible that the board could have intended such a wrong.

Again, it must be remembered that the contract

itself defines extras as "additional quantities required after construction had commenced." Under that clause, nothing specified in the contract itself could be deemed an extra.

The contract itself, together with the specifications, make it clear that the contractor bound himself to build the bridge as described in the contract for $23,800.00, including the substructure. On the first page of the contract, we find this binding provision:

> "Whereas, the said party of the second part has agreed, and by these presents does agree, to construct and build the bridge *hereinafter described*, for the sum of Twenty-Three Thousand Eight Hundred and no/100 ($23,800.00) Dollars,
>
> "Now, Therefore, the said party of the second part has agreed, and by these presents does agree, to and with the party of the first part, for and in consideration of Twenty-Three Thousand Eight Hundred and no/100 ($23,800.00) Dollars, to furnish all the materials and labor therefor, and in an efficient and workmanlike manner, and according to the plans and specifications designed and attached hereto, and made a part hereof, *to construct and erect the following bridge*, upon the site herein named, to-wit:
>
> "Bridge T-3: Over the Little Colorado River east of Winslow".

This is followed by a description of the bridge as actually built, excepting the slight changes thereafter made by Mr. Merritt, of the Indian Office. After this is the provision for extras, which limits extras to those things which might be required after the making of the contract.

> "It is further agreed that in the event of any changes being made by the party of the first part, or any extra required by the party of the first part, such changes or extras shall be made or furnished at prices designated in proposals hereto attached and made a part hereof".

The contract provides, (p. 2) that all payments were to be made from the bridge bond fund, in the manner prescribed by law. Plaintiff knew that the bridge fund was limited to $28,000.00; so far as this bridge was concerned. Plaintiff also knew, as did all parties concerned, as testified by Mr. Creswell, that the Omaha Structural Steel Company was paid about $15,000.00 for completing the final bents or spans in the bridge, and that this balanced the appropriation made by the Government.

Therefore, the contract and specifications and all the attendant circumstances being fairly considered, the intent of the Board that there should be no charge for extras save those arising after the making of the contract, is clear. This is further manifested by the attitude of the Board from first to last, to recognize no claim for extras, save as above stated.

Did the Board of Supervisors have any legal authority to anticipate the possible contribution of the Indian Office to the cost of this bridge? This was purely contingent at the time said contract was signed. No reference is made in the contract to such contingency; it is manifest that the contract made and executed was to be paid out of bond money voted by the people of Navajo county which appropriated the amount of $28,500.00 to the building of the said bridge "T-3". That, and that alone was the only legal source from which payment could be made. This was undoubtedly well known to the plaintiff, and as we have seen from the action and conduct of the Board of Supervisors themselves, they had no notion that the phrase "As per addenda for extras", hidden by a parenthesis in a paragraph devoted to giving specifications as to steel and the dimensions of the steel, the size of the piers and cylinders and other parts of the substructure of said bridge, could or would be construed so as to bind the County for Fifteen Thousand Dollars in excess of the contract fixed in the contract as the cost of said bridge. Now can it be said that the Board of Supervisors and the contractor jointly and contemporaneously intended by the execution of that contract to bind the county to, nearly fifteen thousand dollars in the form of extras, over and above the original cost of the bridge of $23,800.00, when there was no fund with which to pay that amount? When the people of Navajo County had

voted $28,500.00 for that bridge, and no more, and when they knew that they had to build an extra span, as well as approaches to the bridge, can it fairly be said that the Board of Supervisors and the contractor jointly and deliberately intended, in the execution of that contract, to run up the expense of that bridge to nearly sixty thousand dollars, well knowing that they were without legal authority to do so?

Can it now be said that in equity and good conscience, or according to the strict rules of the law, that the plaintiff has anything of which to complain? He was a man of considerable experience as a contractor and in the habit of dealing with municipalities in large figures. He was presumed to know the authority of the officers with whom he dealt and he had for years been in the habit of dealing in matters involving large sums of money with such officers. May it not be assumed that he did actually know what the limitations of their authority were? May it not be assumed that he had efficient and faithful counsel who kept him advised in regard to each particular contract before its execution? If so, the plaintiff is here taking advantage of a "joker" which was inserted in that contract and permitted to remain there through the ignorance or neglect of those who were under the duty of advising the Board of Supervisors in regard to the terms of the contract.

## ASSIGNMENTS COVERING OBJECTIONS TO AND MOTIONS TO STRIKE TESTIMONY.

Assignment VIII. This relates to the denial of defendants' motion to strike Plaintiff's Exhibit No. 21, being the purported claim presented May 23, 1918. (Tr. Rec. 254) The reasons given for the motion were (1) that it was not properly itemized; (2) that on that date the county was not indebted to plaintiff; (3) that the claim is not sued on; (4) that it was not presented within six months from the time the alleged claim, or any item in it arose; (5) that it is irrelevant, incompetent and immaterial.

We have already shown that all the extra work was completed before November 1, 1917. This claim purports to embrace all the extras sued for and was filed "so that the Board could know the items of the November demand". This claim is the only one ever filed that even attempts to itemize the extras in suit, and as it was filed long after the time limited for filing had expired it should have been stricken on that ground alone.

Assignment X. This relates to the striking out of the testimony of R. S. Teeple, who was clerk of the Board of Supervisors during the time the contract for the building of the bridge in question was being worked out. He had testified that the credit of $17,600 appearing on the demand of December 3 included every dollar that had theretofore been paid to plaintiff by the county. This was im-

portant, showing that the Board had never made any allowance for extras. (Tr. Rec. 256) Yet the Court struck it out on the singular ground that the witness was not qualified to answer.

Assignment XI. The Court also struck his testimony as to the additional work the County had to do to complete the bridge after plaintiff had finished his contract. This was material as showing that the $15,000.00 appropriated by the government was expended on this bridge in addition to all that was paid plaintiff. (Tr. Rec. 257)

Assignments XII and XIII. These relate to certain conversations which plaintiff said he had had with the County Engineer. (Tr. Rec. 257-8) It was thus sought to bind the County as to a vital part of the contract. It was not shown that anyone authorized to speak for the County even knew of these conversations.

Assignment XVI relates to the Court's refusal to strike the plaintiffs' conclusion as to the reason why the "addenda" clause was placed in the contract. (Tr. Rec. 259)

Assignment XV relates to the refusal of the court to strike the alleged figuring of extra quantities and costs by plaintiff with the County Engineer, with no showing that such figures were ever brought to the notice of the Board. (Tr. Rec. 260)

Assignment XVI relates to the overruling of defendant's objection to Plaintiff's Exhibit 21, a plan showing the difference between the original

proposal and the plan upon which it was agreed the substructure should be built. Admittedly this exhibit was never submitted to the County Engineer. (Tr. Rec. 260-261)

Assignment XVII relates to the overruling of defendant's objection to plaintiff's detailed statement of the alleged extras, with costs. (Tr. Rec. 262).

Assignment XX relates to the overruling of defendants' objection to the plaintiff's conclusion as to why the words "together with extras herein listed" were placed in the demand of December 3, 1917. (Tr. Rec. 265)

Assignment XXII relates to the denial of defendant's motion to strike plaintiff's testimony as to the items and cost of the alleged extras, upon the ground, among others, that no demand in manner and form required by law covering these extras, was filed within six months from the date of the last item. (Tr. Rec. 267)

Assignment XXIV goes to the overruling of defendant's objection to an explanation of how the "addenda" clause happened to be inserted in the contract. (Tr. Rec. 268)

Assignment XXVI relates to another discussion between plaintiff and the County Engineer, as to the meaning of the "addenda" clause, to which the defendant objected as immaterial, and as a matter by which the county could not be bound. (Tr. Rec. 269).

Assignment XXVII goes to the same matter. (Tr. Rec. 270)

Assignment XXVIII relates to the overruling of defendant's objection to a question asked of plaintiff which plainly called for hearsay as to the County Engineer's understanding of the "addenda" clause. (Tr. Rec. 270-1)

Assignments XXIX and XXX relate to similar questions asked of Witness Popert (Tr. Rec. 272) and similar objections thereto and rulings thereon as are covered in Assignments XVII and XXII.

The assignments not specifically discussed or referred to in the foregoing brief do not, in our judgment, require detailed attention. The questions raised by them have been covered as fully as we think ncessary in the related points herein developed at some length.

For the reasons stated herein, we do not believe the judgment of the trial court can possibly stand, and respectfully submit that it should be reversed or that this court render judgment in favor of the plaintiff in error.

Respectfully submitted,

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